Supreme Court, U. S.
FILED
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1248

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONUTRONIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONIC CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION,
Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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PETITION FOR CERTIORARI FILED FEBRUARY 13, 1979
CERTIORARI GRANTED MAY 14, 1979

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Relevant Docket Entries

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DATE	PROCEEDINGS
1975	
May 5	COMPLAINT; Appearance.
May 5	SUMMONS Copies (27) and Copies (22) of complaint issued. * * *.
*	* * * * * * *
May 30	MOTION of deft. #18 [General Electric Co.] to dismiss or in the alternative for a stay of proceedings; P&A; Exhibits A-D; c/m 5-30-75.
*	* * * * * * *
June 3	ANSWER of deft. #12 [Motorola, Inc.] to complaint; c/m 6-3-75.
June 5	MOTION of deft. #16 [Sharp Electronic Corp.] to dismiss or in the alternative, for stay of proceedings; Exhibit A; c/m 6-5-75.
June 6	MOTION of deft. #9 [RCA Corp.] to dismiss; Memorandum in support; Exhibits A-F; c/m 6-6-75.
June 6	ANSWER of defts. #1, 2, 3, 4, 5, 6 & 7 [Federal Defendants] to complaint; c/m 6-6-75.
June 6	MOTION of defts. #8&14 [GTE Sylvania, Inc., & Aeronutronic Ford Corp.] for an order dismissing the complaint or, in the alternative, staying further proceedings herein; Memorandum in support; Tabs A&B; c/s 6-6-75.
*	* * * * * * *

DATE	PROCEEDINGS
1975	
June 16	ANSWER of deft. #15 [Matsushita Electric Corp. of America] to complaint; c/m 6-16-75.
June 16	CERTIFICATE of Service by deft. #15 [Matsushita Electric Corp. of America] as to service on all counsel on 6-16-75 of answer filed 6-16-75.
June 17	MOTION of deft. #17 [Toshiba of America, Inc.] to dismiss or in the alternative, for a stay of proceedings; Exhibit A; c/s 6-17-75.
*	* * * * * * *
June 25	MOTION of deft. #19 [Admiral Corp.] to dismiss or in the alternative, for a stay of proceedings; Exhibit A; c/m 6-25-75.
June 26	MOTION of deft. #10 [The Magnavox Co.] for an order dismissing the complaint or in the alternative, staying further proceedings; c/s 6-26-75.
*	* * * * * * *
June 30	MOTION of pltfs. for summary judgment; statement of material facts; P&A's; Exhibits A-R; c/m & c/s 6-30-75.
*	* * * * * * *
July 18	MOTION of deft. #11 [Zenith Radio Corp.] for an order to dismiss the complaint or, in the alternative, staying further proceedings; c/m 7-17-75.
*	* * * * * * *

DATE	PROCEEDINGS
1975	
July 24	MOTION of deft. #13 [Warwick Electronics, Inc.] to dismiss the complaint and to quash the return of service or in the alternative for stay of proceedings; Affidavit; P's & A's; copy of affidavit; c/m 7-24.
*	* * * * * * *
July 25	JOINT Memorandum of Aeronutronic Ford Corporation and GTE Sylvania Incorporated in reply to pltfs' memorandum in opposition to defts' motion to dismiss or in the alternative for a stay of proceedings; c/m 7-25-75.
Aug. 08	OPPOSITION by pltfs. to motion of deft. #13 [Warwick Electronics, Inc.] to quash the return of service of process; c/m 8-7-75.
Aug. 19	REPLY of deft. #13 [Warwick Electronics, Inc.] to pltfs.' opposition to motion to dismiss the complaint and to quash the return of service of process, or in the alternative for stay of proceedings; c/m 8-19.
Aug. 22	SURREPLY by pltfs. to deft's reply to pltffs' opposition to motion of deft. #13 [Warwick Electronics, Inc.] to dismiss the complaint and to quash the return of service of process or, in the alternative, for stay of proceedings; Attachment A, B & C; c/m 8-22-75.
Sept. 12	MEMORANDUM OPINION. (N) Richey, J.

DATE	PROCEEDINGS
1975	
Sept. 12	ORDER granting defts.' motion to dismiss; dismissing the complaint (signed 9-11-75) (N) Richey, J.
Sept. 23	NOTICE of appeal by pltfs. from order of 9-11-75 and filed 9-12-75; Deposit $5.00; copies mailed to all counsel of record.
Oct. 9	ORDER correcting several inadvertent errors in the Memorandum Opinion of 9-12-75. (N) Richey, J.
Nov. 3	RECORD on Appeal delivered to USCA; receipt acknowledged. (USCA No. 75-2059)
1976	
Feb. 19	CERTIFIED copy Order USCA entered 2-19-76 denying motion for summary reversal.

* * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DATE	FILINGS—PROCEEDINGS
1975	
Nov. 3	Certified Original Record (no transcript) including 2 vols. of Orig. Record (n-6).
Nov. 3	4-Appellants' motion for summary reversal (m-3).

* * * * * * *

Nov. 12	4-Appellee's (Motorola) response to motion for summary reversal (m-10).
Nov. 13	4-Appellee's (General Electric Company) opposition to motion for summary reversal (m-13).
Nov. 13	4-Appellee's (Admiral Corporation) opposition to motion for summary reversal (m-13).
Nov. 13	4-Appellee's (Matsushita Electric Corporation of America) opposition to motion for summary reversal (m-13).
Nov. 13	4-RCA Corporation's (appellee) opposition to motion for summary reversal (m-13).
Nov. 13	4-Appellee's (GTE Sylvania Inc., et al.) opposition to motion for summary reversal (m-13) (OK DMC).

* * * * * * *

Nov. 21	4-Memorandum of appellee Toshiba America, Inc. in opposition to appellants' motion for summary reversal (m-14).

DATE	FILINGS—PROCEEDINGS
1975	
Nov. 21	4-Appellee Warwick Electronics, Inc.'s memorandum in opposition to appellants' motion for summary reversal (m-17).
Nov. 21	4-Joint memorandum of appellees The Magnavox Co. and Zenith Radio Corp. in opposition to appellants' motion for summary reversal (m-17).
* * * * * * *	
Nov. 26	4-Appellees' opposition to motion for summary reversal (m-26).
* * * * * * *	
Dec. 2	4-Joint memorandum of appellees the Magnavox Co. and Zenith Radio Corp. in opposition to appellants' motion for summary reversal (m-17).
1976	
Feb. 19	Per Curiam order that appellants' motion for summary reversal is denied; Bazelon, CJ and Wilkey, CJ.
Feb. 19	Certified copy of the above order sent to Clerk, U.S. District Court, and a copy to Judge Richey.
* * * * * * *	
Apr. 5	15-Appellants' brief (m-5).
Apr. 5	7-Appellants' appendix (m-5).

DATE	FILINGS—PROCEEDINGS
1976	
Apr. 19	Letter from counsel for appellant advising that this case is filed under GRC Rule 7(c)(3) (Freedom of Information Act) (OK, RB).
* * * * * * *	
May 5	15-Joint brief of appellees—Admiral Corp., General Electric Co., Motorola, Inc., RCA Corp., Sharp Electronics Corp., Toshiba-America, Inc. and Warwick Electronics, Inc. (m-5).
May 5	15-Appellee's (Matsushita Electric Corp. of America) brief (m-5).
May 5	25-Appellee's (GTE Sylvania Inc. and Aeronutronic Ford Corp.) brief (m-5).
May 6	15-Appellees' (Magnavox Company and Zenith Radio Corp.) brief (m-6).
* * * * * * *	
June 2	7-Federal appellees brief (m-13).
June 2	15-Federal appellees' brief (m-21).
* * * * * * *	
Sept. 21	Argued before CJ Bazelon; Wright and Robinson, CJ.
1977	
July 5	Opinion for the Court filed by Circuit Judge Wright.

DATE	FILINGS—PROCEEDINGS
1977	
July 5	Judgment reversing judgment of the District Court and remanding for further proceedings in accordance with opinion filed this date.
* * * * * * *	
July 18	11-Appellees' petition for rehearing and suggestion for rehearing en banc (m-18).
July 18	11-Appellees' motion to file appendix to petition for rehearing and suggestion for rehearing en banc (m-18) (Aeronutronic Ford Corp., GTE Sylvania Inc., The Magnavox Co., Matsushita Electric Corp., Toshiba-America, Inc., and Zenith Radio Corp.).
July 19	11-Appellees' (Admiral Corp., General Electric Corp., Motorola, Inc., Sharp Electronics Corp., Toshiba-America, Inc., and Warwick Electronics, Inc.) petition for rehearing and suggestion for rehearing en banc (m-19).
July 19	4-Appellees' (Admiral Corp., et al) motion to lodge exhibits (m-19).
July 19	4-Appellee's (RCA Corp.) petition for rehearing and suggestion for rehearing en banc (m-19).
July 19	4-Appellee's (RCA Corp.) petition for leave to lodge exhibits attached to petition for rehearing and suggestion for rehearing en banc (m-19).

DATE	FILINGS—PROCEEDINGS
1977	
July 25	Per Curiam order that the time for filing the federal appellees' petition for rehearing is extended to August 2, 1977, and, that counsel for appellants are directed to file on or before August 22, 1977, a response to the petitions including those to be filed on August 2, 1977; CJ Bazelon; Wright and Robinson, CJ.
Aug. 2	11-Appellee's (Federal) petition for rehearing (m-2).
Aug. 18	11-Appellants' response to petitions for rehearing (m-17).
Aug. 24	4-Appellees' motion to lodge pertinent documents in related case with the court (m-19).
Aug. 25	Per Curiam order that the motions of Appellees, Admiral Corporation, et al to lodge exhibits on July 19, 1977; Appellees Aeronutronic Ford Corporation, et al to file an appendix to the petition for rehearing and suggestion for rehearing en banc; Appellees RCA Corporation for leave to lodge exhibits attached to petition for rehearing en banc; and on August 24, 1977 Consumer Product Safety Commission's motion to lodge certain documents in a related case are granted.
Aug. 25	11-Appellees' (Aeronutronic Ford Corp., et al) appendix to petition for rehearing and suggestion for rehearing en banc (m-18).

DATE	FILINGS—PROCEEDINGS
1977	
Aug. 25	11-Appellees (Admiral Corp., et al) exhibits in support of petition for rehearing en banc—LODGED.
Aug. 25	11-Appellees (RCA Corp.) exhibits to petition for rehearing en banc—LODGED.
Aug. 25	4-Appellees (Consumer Product Safety Comm.) certain documents in a related case—lodged.
Aug. 25	Per Curiam order that the applications for rehearing are denied for the reasons stated in the attached per curiam; CJ Bazelon; Wright and Robinson, CJ.
Aug. 25	Per Curiam order en banc that the suggestion for rehearing en banc are denied; CJ Bazelon; Wright, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, CJ.
* * * * * * *	
Sept. 9	Per Curiam order granting various motions for stay of mandate; the Clerk is directed not to issue the mandate prior to October 4, 1977. CJ Bazelon; Wright and Robinson CJ's.
Oct. 11	Certified copy of notice from Clerk, Supreme Court notifying that petition for writ of certiorari was filed in SC No. 77-508 on October 3, 1977.

DATE	FILINGS—PROCEEDINGS
1978	
Jan. 26	Certified copy of order of the Supreme Court granting petition for writ of certiorari in S.C. #77-508 on January 16, 1978.
Jan. 26	Certified copy of order of the Supreme Court vacating judgment of the USCA and remanding case to USCA for further consideration in light of the permanent injunction entered by the U.S. District Court for the District of Delaware on December 8, 1977, in Civil Action No. 75-104; filed January 16, 1978 in S.C. #77-508.
Jan. 30	4-Appellees' (GTE Sylvania, etc) motion to set briefing schedule (m-30).
Jan. 30	4-Appellees' (GTE Sylvania, etc) motion to lodge exhibits (m-30).
Feb. 24	4-Appellants' motion to set briefing schedule on remand (m-24).
Sept. 20	Per Curiam order that the parties file, within 20 days, memoranda in typewritten form setting forth their views as to the course this Court should take in light of the remand of the case by the Supreme Court to this Court for further consideration. The parties are instructed to address with particularity the question whether the permanent injunction entered in Civ. No. 75-104 (D.Del Dec. 8, 1977), bars appellants, who were not parties in that case, from litigating in this case their claim

DATE	FILINGS—PROCEEDINGS
1978	
	that the materials at issue should be disclosed; CJ Wright, Bazelon and Robinson, CJ's.
* * * * * * *	
Oct. 30	7-Appellee's (Manufacturers) memorandum in response to this Court's order of September 20, 1978 (m-30).
Oct. 30	15-Appellants' memorandum in response to the Court's order of September 20, 1978 (m-30).
* * * * * * *	
Nov. 9	4-Memorandum of Consumer Product Safety Commission, et al. (m-2).
Dec. 22	Opinion for the Court filed by Circuit Judge Robinson.
Dec. 22	Judgment that the case is remanded to the District Court for further proceedings, in accordance with the opinion of this Court filed herein this date.
Dec. 22	4-Letter from counsel for appellee (CPSC) in the nature of an 8(g) letter (OKGF).
1979	
* * * * * * *	
Jan. 23	Per Curiam order granting appellees' motions for stay of mandate and the Clerk is directed not issue the mandate in this case prior to 2/12/79; CJ Wright; Bazelon & Robinson, CJs.

DATE	FILINGS—PROCEEDINGS
1979	
Feb. 14	Notification from Clerk, Supreme Court that petition for writ of certiorari was filed on February 12, 1979 in SC No. 78-1248.
Feb. 15	Certified certificate from Clerk, Supreme Court that a petition for writ of certiorari was filed in SC No. 78-1248 on February 12, 1979 and is now pending.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC.,
PUBLIC CITIZEN'S HEALTH RESEARCH GROUP,
Plaintiffs,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
RICHARD O. SIMPSON,
BARBARA H. FRANKLIN,
LAWRENCE KUSHNER,
CONSTANCE NEWMAN,
R. DAVID PITTLE,
SADYE DUNN,
GTE SYLVANIA, INC.,
RCA CORPORATION,
THE MAGNAVOX COMPANY,
ZENITH RADIO CORPORATION,
MOTOROLA, INC.,
WARWICK ELECTRONICS, INC.,
AERONUTRONIC FORD CORPORATION,
MATSUSHITA ELECTRIC CORPORATION
OF AMERICA,
SHARP ELECTRONIC CORPORATION,
TOSHIBA OF AMERICA, INC.,
GENERAL ELECTRIC COMPANY,
ADMIRAL CORPORATION.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF.

1. This is an action under the Freedom of Information Act, as amended, 5 U. S. C. § 552 ("the Act"), by consumer organizations seeking an opportunity to inspect and/or copy documents in the possession of the Consumer Product Safety Commission concerning television-related accidents.

2. This Court has jurisdiction over the subject matter of this Complaint pursuant to 5 U. S. C. § 552(a)(3); 5 U. S. C. § 702; and 28 U. S. C. § 2201-02. Venue is properly laid in this district pursuant to the Act, 5 U. S. C. § 552(a)(3).

3. Plaintiff Consumers Union of United States, Inc. ("Consumers Union"), with several hundred thousand members, many of whom are owners or prospective owners of televisions which are or may be hazardous, is the largest consumer organization in the United States. It was organized in 1936 as a nonprofit organization under the laws of the State of New York to provide information, education and counsel on consumer goods and services. Consumers Union publishes *Consumer Reports,* a monthly magazine of consumer information with a paid circulation of more than 2 million readers. Consumers Union tests and rates consumer products, including televisions, and gathers other information relating to the performance, including safety performance, of these products. *Consumer Reports* regularly carries, and plans to carry in the future, articles reflecting such testing and rating of televisions.

Plaintiff Public Citizen is a nonprofit organization supported by voluntary donations from individuals, many of whom are owners or potential owners of television sets which are or may be hazardous. Public Citizen funds

the Health Research Group which conducts research and publishes information for consumers relating to potential hazards to health and safety from consumer products.

4. Defendant Consumer Product Safety Commission ("the Commission") is an independent regulatory commission established pursuant to the Consumer Product Safety Act of 1972, 15 U. S. C. § 2051 *et seq.*

Defendant Richard O. Simpson is Chairman of the Commission.

Defendants Barbara Franklin, Lawrence Kushner, Constance Newman, and R. David Pittle are Commissioners of the Commission.

Defendant Sadye Dunn is the Secretary of the Commission and the official designated by the Interim Freedom of Information Guidelines of the Commission to bear ultimate responsibility for responding to requests for records. (39 Fed. Reg. 30299, August 21, 1974).

Defendants GTE Sylvania, Inc., RCA Corporation, The Magnavox Company, Zenith Radio Corporation, Motorola, Inc., Warwick Electronics, Inc., Aeronutronic Ford Corporation, Matsushita Electric Corporation of America, Sharp Electronics Corporation, Toshiba of America, Inc., General Electric Company, and Admiral Corporation are each corporations which manufacture television equipment and do business in the District of Columbia. Said defendants are hereinafter referred to collectively as "defendant corporations."

5. By separate letters dated June 14, 1974, plaintiffs each requested from defendant Commission under authority of the Act, an opportunity to inspect and/or copy documents relating to the safety of television sets, which documents were submitted by defendant corporations to the Commission in response to the Commission's Special Orders ("Special Orders") dated May 13, 1974.

In oral conversations, plaintiffs, defendant Dunn and other representatives of the defendant Commission agreed to extend the request to documents submitted by defendant corporations in response to Commission subpoenas directed to the defendant corporations and dated July 26, 1974.

6. Subsequently, plaintiffs limited their request to include only (a) the aforesaid submitted documents concerning television-related accidents and (b) documents resulting from Commission processing of such submitted documents, but excluding (1) legal correspondence which is within the attorney-client relationship or the attorney work product doctrine, and (2) the names and addresses of accident victims. Documents embraced within this limited request are hereinafter referred to as "the requested documents."

7. On November 5, 1974, following various efforts by plaintiffs to obtain Commission action on their requests, plaintiffs, defendant Dunn and other employees of the Commission met to discuss the status of plaintiffs' request, at which meeting plaintiffs protested defendant Commission's refusal, based upon blanket claims of confidentiality asserted by the defendant corporations, to disclose the requested documents. Commission representatives responded that a legal determination as to the availability of the requested documents for which claims of confidentiality had been advanced would be completed by mid-March 1975. By letter dated November 18, 1974, plaintiffs acquiesced to this timetable, but expressly reserved the right to consider additional delay as constituting a denial of their request.

8. On March 28, 1975, defendant Commission determined, *inter alia*, that the requested documents do not constitute exempt information under the Act, 5 U. S. C.

§ 552(b), and that even if the data could be considered exempt, disclosure is appropriate in the interest of public health and safety.

9. By letter dated April 8, 1975, defendant Commission notified defendant corporations of the Commission's decision to release the requested documents. By telegram of April 17, 1975 (and correction of April 21, 1975), the Commission notified defendant corporations that no requested documents would be released until May 1, 1975.

10. By filing separate actions on or after April 22, 1975, in the United States District Court for the District of Delaware, defendants GTE Sylvania, Inc. (Civil Action 75-104), RCA Corporation (Civil Action 75-108), The Magnavox Company (Civil Action 75-112), Zenith Radio Corporation (Civil Action 75-113), Motorola, Inc. (Civil Action 75-114), Warwick Electronics, Inc. (Civil Action 75-115), and Aeronutronic Ford Corporation (Civil Action 75-116) have sought injunctions against disclosure, *Inter alia,* of the requested documents.

By filing separate actions on or after April 22, 1975, in the United States District Court for the Southern District of New York, defendants Matsushita Electric Corporation of America (Civil Action 75-2040), Sharp Electronic Corporation (Civil Action 75-2049), and Toshiba of America, Inc. (Civil Action 75-2050) have sought injunctions against disclosures, *inter alia,* of the requested documents.

Defendant General Electric Company filed suit (Civil Action 75-CV-189) in the United States District Court for the Northern District of New York seeking an injunction against disclosure, *inter alia,* of the requested documents.

Defendant Admiral Corporation (Civil Action 75-531) filed suit in the United States District Court for the Western District of Pennsylvania seeking an injunction against disclosure, *inter alia,* of the requested documents.

11. Defendant corporations applied for temporary restraining orders prohibiting disclosure of the requested documents in each of the actions described in paragraph 10 hereof. In each case, the Commission has consented to said applications and as a result, temporary restraining orders have been entered in each case for periods of up to 60 days, and disclosure of the requested documents to plaintiffs has thereby been prevented.

12. By letter dated April 28, 1975, plaintiff Consumers Union notified defendant Commission and defendant Dunn that the Commission's action in consenting to such a temporary restraining order would be deemed a denial of plaintiffs' rights to the requested documents and that plaintiffs would seek their remedy in court.

13. The requested documents are subject to mandatory disclosure under the Act, and the continued and prolonged withholding of such documents by defendant Commission, including its consent to applications by defendant corporations for said temporary restraining orders violates the Act. Plaintiffs have been and are irreparably harmed thereby and lack an adequate remedy at law.

WHEREFORE, plaintiffs pray:

(1) that this Court declare that the requested documents must be made immediately available to plaintiffs for inspection and/or copying;

(2) that this Court permanently enjoin defendant Commission and its agents and employees from failing to make the requested documents immediately available to plaintiffs for inspection and/or copying of the requested documents;

(3) that this Court expedite these proceedings;

(4) that this Court award plaintiffs their costs and disbursements in this action, including reasonable counsel fees; and

(5) that this Court grant such other relief as the Court may deem just and proper.

Respectfully submitted,

[Signatures of Counsel Deleted]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

September 11, 1975

Opinion.

RICHEY, *District Judge.*

Plaintiffs Consumers Union of United States, Inc., and Public Citizens' Health Research Group filed this action on May 5, 1975, seeking access under the Freedom of Information Act, 5 U. S. C. § 552, to certain reports on television accidents submitted to the Consumer Product Safety Commission (CPSC) by various television manufacturers. The defendants in this case are the CPSC, its Chairman, Commissioners, and Secretary; and twelve television manufacturers which submitted the reports in question. The plaintiffs seek relief in the following form: (a) a declaration that the requested documents, currently in possession of the CPSC, must be made immediately available to the plaintiffs for inspection and/or copying; and (b) an injunction enjoining the CPSC and its agents and employees from failing to make the requested documents immediately available to plaintiffs for inspection and/or copying.

The case is currently before the Court on the motions of ten television manufacturers to dismiss or, in the alternative, to stay these proceedings.[1] The defendants claim that with respect to the Government, the complaint fails to present a "case or controversy" within the meaning of Article III, section 2 of the United States Constitution,[2] and that with respect to the manufacturers the complaint fails to state a claim upon which relief can be granted. The defendant-manufacturers also claim that because a similar action involving virtually the same issues is pending in the United States District Court for the District of Delaware, this action should be dismissed in the interests of comity and judicial economy.

I. Background.

A somewhat complex course of events provides the background for this action. In May, 1974, the CPSC issued special orders to television manufacturers requesting that they submit, *inter alia*, all accident reports collected by the manufacturers since the National Commission on Product Safety held certain hearings in 1969. The CPSC also invited the manufacturers to indicate which, if any, of the reports they submitted were, in the manufacturers' view, entitled to exemption from disclosure under the Freedom of Information Act (FOIA). In June, 1974, plaintiffs herein requested access, under the FOIA, to the documents submitted by the manufacturers in response to the CPSC's orders of the previous month. While the

1. Defendants Admiral, Aeronutronic Ford, General Electric, GTE Sylvania, Magnavox, RCA, Sharp, Toshiba, Warwick, and Zenith have so moved. The remaining defendants, Motorola, Matsushita, and the CPSC, have in effect so moved by praying for dismissal in their answers to the plaintiffs' complaint.

2. The federal defendant has also, in effect, so moved. See note 1, *supra*, and Answer of the Consumer Product Safety Commission at "First Defense".

plaintiffs were given access to those reports for which confidentiality was not claimed by the manufacturers, the plaintiffs were not immediately afforded access to the documents which the manufacturers claimed were exempt from the FOIA. Instead, the CPSC, in August, 1974, informed the manufacturers of the plaintiffs' FOIA request and directed the manufacturers to substantiate their claims of confidentiality. In the meantime, the CPSC had determined, in July, 1974, that the manufacturers' response to its first request for documents was not complete; the CPSC ordered the manufacturers to make further submissions and extended the plaintiffs' FOIA request to the additional data submitted by the manufacturers. Plaintiffs subsequently limited their request to exclude documents protected by the attorney-client privilege or the work-product doctrine and those portions of documents which contained the names and addresses of accident victims.

With their request still unanswered, plaintiffs informed the CPSC in October, 1974, that any further delay would be considered by the plaintiffs as a denial of their request under the FOIA. As a result of that communication, representatives of the plaintiffs and the CPSC met in November, 1974, and agreed upon a timetable for the completion of CPSC's review of the voluminous submissions. It was estimated that the CPSC's legal determination as to the availability of the requested documents would be completed by mid-March of 1975. Plaintiffs acquiesced in that timetable, but expressly reserved the right to consider additional delay as a denial of their request.

On March 28, 1975, the CPSC issued its legal determination that the documents requested by the plaintiffs did not fall within the exemptions of the FOIA and that, even if the data were exempt, disclosure by the CPSC was

nonetheless within its discretion and, in this case, appropriate in the interest of public health and safety. The CPSC subsequently notified the television manufacturers of its decision to release the requested documents and of its intention to withhold disclosure until May 1, 1975. Upon said notice, seven of the defendant television manufacturers filed separate actions against the CPSC in the United States District Court for the District of Delaware,[3] each seeking an injunction prohibiting disclosure on the grounds that the release of the documents is barred by the exemptions to the FOIA and certain portions of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* Five other television manufacturers filed similar separate actions in the United States District Court for the Southern District of New York,[4] the United States District Court for the Northern District of New York,[5] and the United States District Court for the Western District of Pennsylvania.[6] In all of the actions, the manufacturers applied for temporary restraining orders prohibiting the release of the documents pending determination of their motions for preliminary injunction. The CPSC consented to the temporary restraining order in at least some of the cases.[7]

3. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (C. A. No. 75-104), RCA (C. A. No. 75-108), Magnavox (C. A. No. 75-112), Zenith, (C. A. No. 75-113), Motorola (C. A. No. 75-114), Warwick (C. A. No. 75-115), and Aeronutronic Ford (C. A. No. 75-116).

4. Matsushita (C. A. No. 75-2040), Sharp (C. A. No. 75-2049), and Toshiba (C. A. No. 75-2050), filed actions in the Southern District of New York.

5. General Electric (75-CV-189) filed suit in the Northern District of New York.

6. Admiral (C. A. No. 75-531) filed suit in the Western District of Pennsylvania.

7. The plaintiffs claim that the agency consented to the orders in all of the cases filed by the manufacturers. Plaintiffs' complaint at ¶ 11. The CPSC claims that it consented to some but not all of the orders. Answer of the Consumer Product Safety Commission at ¶ 11. For purposes of this motion to dismiss, plaintiffs' allegations are taken as true.

The instant action was filed on May 5, 1975. Subsequently, the individual actions filed by the television manufacturers were consolidated in the District of Delaware.[8] Oral arguments on the preliminary injunction motion in the consolidated cases were heard by Chief Judge Latchum in July, 1975. The documents in question in both this action and the consolidated cases in Delaware remain in the possession of the CPSC and subject to the above-mentioned restraining orders pending Judge Latchum's decision on the motion for preliminary injunction.[9]

II. No Case or Controversy Exists Between Plaintiffs and the CPSC.

Plaintiffs invoke the jurisdictional sections of the FOIA, 5 U. S. C. § 552(a)(3), and the Administrative Procedure Act, 5 U. S. C. § 702, as bases for this Court's jurisdiction in this case.[10] Both statutes pertain to actions against federal agencies. In this case, plaintiffs seek an order instructing the agency to provide plaintiffs access to the documents in question for inspection and/or copying. At the heart of plaintiffs' claim is their contention that the documents are subject to mandatory disclosure under

8. *In re: Consumer Product Safety Commission Litigation*, Civil Action Nos. 75-104, 75-108, 75-112, 75-113, 75-114, 75-115, 75-116, 75-122, 75-131, 75-136, 75-150, 75-151, 75-152 (D. Del.).

9. The statement of facts above is drawn from all of the substantive pleadings in this case.

10. Plaintiffs also invoke the Declaratory Judgment Act, 28 U. S. C. § 2201-02, as a ground for this Court's jurisdiction, plaintiffs' complaint at ¶ 2. The Declaratory Judgment Act is not, however, a statute which confers jurisdiction. See, *e.g.*, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667 (1950).

the FOIA.[11] The defendant agency, however, came to the exact same conclusion in its above-mentioned formal finding of March 28, 1975. The CPSC and the plaintiffs thus stand in the same position on the crucial issue in this case.

The Constitution extends federal courts' jurisdiction only to specified cases and controversies.[12] Implicit in the "case and controversy" doctrine is the requirement that litigation must arise "between adverse litigants." *Muskrat v. United States*, 219 U. S. 346, 361 (1911); *Aetna Life Insurance Co. v. Hawarth*, 300 U. S. 227 (1937). Where opposing litigants desire "the same result," as here, there is "no case or controversy within the meaning of Art. III of the Constitution." *Moore v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 47, 48 (1971); *General Electric Co. v. Bootz Mfg. Co.*, 289 F. Supp. 504 (D. Ind. 1968). This Court is faced with the prospect in the instant action that both the plaintiffs and the CPSC will submit briefs urging the same conclusion as to the availability of the documents under the FOIA. In such a posture, this case does not present a question "in an adversary context," as required by the Constitution. *Flast v. Cohen*, 392 U. S. 83, 95 (1968).

Plaintiffs contend, however, that the "controversy" which they present as between themselves and the agency centers on the agency's failure to contest the temporary restraining orders issued in the now-consolidated cases brought by the manufacturers. According to the plaintiffs, the agency's failure to contest the orders constituted a violation of the agency's duty under the FOIA to speedily deliver the documents in question once a determination

11. See plaintiffs' complaint at ¶ 13.

12. U. S. Const., art. III, § 2. See *Golden v. Zwickler*, 394 U. S. 103 (1969); *Baker v. Carr*, 369 U. S. 186 (1969).

was made that such documents were subject to disclosure. Plaintiffs also allege that the agency's failure to contest the orders reflects a certain lack of good faith toward the plaintiffs.

As an initial matter, this Court notes, admittedly without having all of the facts before it,[13] that it does seem curious that the agency, having just completed a nine-month legal investigation which led to the conclusion that the documents were available under the FOIA, failed to make even a *pro forma* opposition to the motions for restraining orders. However, regardless of any possible impropriety on the agency's part, its failure to contest the motions does not present a "controversy" between plaintiffs and the CPSC in this case. Plaintiffs do not ask for a mere declaration that the agency "shouldn't have" consented to the orders—it is doubtful, in fact, that such a "wrong" would be actionable. Plaintiffs ask instead that the agency be ordered to release the documents to the plaintiff, and a decision to that effect made by this Court would necessarily entail a determination that the documents are subject to disclosure under the FOIA. As discussed above, there is no adversity between the agency and the plaintiffs, and thus no case or controversy, with respect to the FOIA issue.

Plaintiffs point to the case of *Robertson v. Department of Defense*, Civil No. 74-644 (D. D. C., June 19, 1975), in support of their claim that a controversy exists in the instant action. *Robertson* involved a very similar fact situation to this case. The General Motors Corporation had submitted certain documents to the Department of Defense which Robertson subsequently requested, for purposes of inspection, under the FOIA. The Department determined that some *but not all* of the documents were

13. See note 7, *supra*.

subject to FOIA disclosure. General Motors thereupon sued the Department and other federal defendants in the United States District Court for the Eastern District of Virginia, seeking an injunction against the disclosure of the documents. Robertson countered by filing an FOIA suit against the Department and General Motors in this Court. In allowing the plaintiff to maintain suit, Judge Barrington D. Parker pointed out what is, for purposes of the instant case, the crucial characteristic of *Robertson*: "[I]n the Virginia proceeding and in the matter before this Court, the government has never taken the position espoused by Robertson—that the documents, in their entirety, are obtainable under the Act." Memorandum Opinion of June 19, 1975, at 8. In *Robertson*, unlike the instant action, there were areas of disagreement between the plaintiff and the governmental defendant.[14]

In essence, what the plaintiffs ask this Court to do in the instant case is to re-determine whether the restraining orders obtained by the manufacturers in various federal district courts should have issued. It is true that the CPSC consented to the various orders. Nonetheless, it was the responsibility of each court—and this Court cannot but assume that said responsibility was met—to make an independent determination that an order was justified. See, *e.g.*, Judge Latchum's Temporary Restraining Order of April 23, 1975, in *RCA Corp. v. United States Consumer Product Safety Commission*, Civil No. 75-108 (D. Del. filed April 22, 1975). As the United States Court of Ap-

14. Plaintiffs also question the genuineness of the agency's conclusion on the FOIA issue: "[E]ven if the Commission should prevail in the Delaware action, it could then decide as a discretionary matter to refuse to disclose the data to plaintiffs." Plaintiffs' Motion for Summary Judgment at 43 n. * *. But the agency has assured the Court on the public record that "disclosure will be made as soon as the federal defendants are not enjoined from doing so." CPSC's Answer at ¶ 13.

peals for the District of Columbia Circuit has noted, "in the interests of comity and the orderly administration of justice we should not attempt to reexamine . . . matters considered and resolved by . . . a court having authority equal to our own." *Hilton Hotels Corp. v. Weaver*, 325 F. 2d 1010 (1963), *cert. denied*, 376 U. S. 951 (1964) (footnote omitted).

III. Plaintiffs' Complaint Fails to State a Claim Against the Defendant-Manufacturers Upon Which Relief Can Be Granted.

As noted above, this case is brought under the FOIA and the Administrative Procedure Act. Those statutes entitle a claimant to relief against federal agencies and, accordingly, plaintiffs' complaint is styled to request relief from inaction by the CPSC. Plaintiffs have also named twelve television manufacturers as defendants in this case, but no relief is requested from the manufacturers. Indeed, the manufacturers are in no position to provide relief inasmuch as the documents in question are in the possession of the agency. Thus, as to the defendant-manufacturers, plaintiffs "can prove no set of facts in support of [their] claim which would entitle them to relief." *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957). The defendant-manufacturers would thus seem to be entitled to dismissal under Fed. R. Civ. P. 12(b)(6) because of plaintiffs' failure to state a claim upon which relief can be granted.

Plaintiffs maintain, however, that because the defendant-manufacturers have such a strong interest in the outcome of this litigation, they are subject to suit under the compulsory joinder provision of Fed. R. Civ. P. 19(a). Assuming *arguendo* that Rule 19(a) could be so employed in the current litigation, the plaintiffs would nonetheless be faced with an uncleared hurdle: lack of jurisdiction.

As noted in the preceding section, there is no case or controversy between plaintiffs and the federal defendant. Lack of a case or controversy is a jurisdictional defect. See *Aetna Life, supra; Tilley Lamp Co. v. Thacker,* 454 F. 2d 805, 808 (5th Cir. 1972). Plaintiffs have suggested that "even assuming *arguendo* that no live case or controversy existed between plaintiffs and the Commission, nothing is clearer than that a very live case or controversy exists between plaintiffs and the manufacturers." Plaintiffs' Motion for Summary Judgment at 35. Plaintiffs would thus provide the missing jurisdictional ingredient of case or controversy by joining, under Rule 19(a), the defendant-manufacturers who certainly possess an interest adverse to plaintiffs' in this litigation. The plaintiffs' solution is ingenious but unfortunately not authorized by Rule 19, which is "predicated upon the preexistence of federal jurisdiction over the cause of action . . ." *Letmate v. Baltimore and Ohio R. R.,* 311 F. Supp. 1059, 1062 (D. Md. 1970). Rule 19 canot be used "in a way that would extend the subject matter jurisdiction of the Federal courts; indeed, Rule 82 precludes any construction of the Rule that would have such an effect." 7 Wright and Miller, *Federal Practice and Procedure* § 1602, at 20 (footnote omitted); see also *Anderson v. United States,* 217 F. Supp. 814 (E. D. Pa. 1963).

IV. Conclusion.

Plaintiffs' complaint must therefore be dismissed for failure to present a case or controversy as to the federal defendant and failure to state a claim upon which relief can be granted as to the defendant-manufacturers.[15] In

15. Defendant-manufacturer Warwick has moved for dismissal on the additional grounds that this Court lacks personal jurisdiction over Warwick. In view of the Court's disposition of this case, it is unnecessary to consider Warwick's motion.

reaching this conclusion, the Court notes that it is especially reluctant to bar the courthouse door when the plaintiff is, as in the instant case, a representative of the public interest. But the Constitution demands no less, considering the present posture of this case.

The Court is aware of the possibility that plaintiffs failed to intervene in the Delaware proceedings in the hope that this Court would assume jurisdiction in the present case. In declining to do so, this Court in no way intends to prejudice any future efforts plaintiffs might make to intervene in the Delaware proceeding.

An order in accordance with the foregoing Memorandum Opinion will be issued of even date herewith.*

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

Dated: September 11, 1975

* The Opinion of the District of Columbia District Court is reproduced as corrected by the October 9, 1975 Order of the District of Columbia District Court correcting inadvertent errors.

Order of the District of Columbia District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Order.

This case has come before the Court on the motions of various defendants to dismiss and the plaintiffs' opposition thereto. The Court has considered the extensive pleadings filed by the parties in this case, and for the reasons set forth in the memorandum opinion of the Court of even date herewith, concludes that the case should be dismissed because: (a) as to the federal defendant, plaintiffs do not present a case or controversy within the meaning of Article III, section 2 of the United States Constitution; and (2) as to the defendant-manufacturers, plaintiffs do not state a claim upon which relief can be granted.

Therefore, it is, by the Court, this 11th day of September, 1975,

ORDERED, that defendants' motion to dismiss be, and the same hereby is, granted; and it is

FURTHER ORDERED, that this case be, and the same hereby is, dismissed.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Court

Plaintiffs' Notice of Appeal

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC., et al., *Plaintiffs,*

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al., *Defendants.*

Notice of Appeal

Notice is hereby given that Consumers Union of United States, Inc. and Public Citizens Health Research Group, plaintiffs in the above-named action, hereby appeal to the United States Court of Appeals for the District of Columbia from the order granting defendants' motion to dismiss entered in this action on the eleventh day of September, 1975.

[Signatures of Counsel Deleted]

Dated: September 22, 1975

FIRST OPINION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Before: BAZELON, *Chief Judge*, and WRIGHT AND ROBINSON, *Circuit Judges.*

Argued September 21, 1976
Decided July 5, 1977

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: We consider here an appeal from a dismissal of an action brought by the appellants under the Freedom of Information Act (FOIA), 5 U. S. C. § 552 (1970 & Supp. V 1975). They seek to obtain, from the Consumer Product Safety Commission, reports which various television manufacturers have submitted on television-related accidents.

For the reasons stated below, we reverse the District Court's dismissal of the plaintiffs' action and remand the case for further proceedings.

I. THE PARTIES

Appellant Consumers Union is a nonprofit consumer organization. It provides information—through its monthly magazine *Consumer Reports* and through other means—on the merits, defects, dangers, and comparative efficacy of consumer goods, including television sets. Appellant Public Citizen, also a nonprofit organization, funds the Health Research Group which conducts research and publishes information for consumers relating to potential hazards to health and safety from consumer products.

Appellee Consumer Product Safety Commission is an independent regulatory agency established by Congress in 1972 pursuant to its enactment of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* (Supp. V 1975). The Commission's purpose is to help implement the Act's policy of establishing "comprehensive and effective regulation over the safety of unreasonably hazardous consumer products." [1] Several of the officers of the Commission and 12 companies that manufacture television sets and do business in the District of Columbia were, together with the Commission, also named as defendants below and are also appellees before this court.

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1. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 26 (1972). The purposes of the Act are:

> (1) to protect the public against unreasonable risks of injury associated with consumer products;
>
> (2) to assist consumers in evaluating the comparative safety of consumer products;
>
> (3) to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations; and
>
> (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

15 U. S. C. § 2051(b) (Supp. V 1975).

II. Background

The background of the present impasse is extensive and, in some respects, complex. In March 1974 the Commission issued a public notice [2] announcing that it would hold a public hearing to investigate hazards encountered during operation of television receivers and to consider the necessity of developing safety standards for such receivers. In the notice the Commission requested certain technical information and data on television-related accidents from manufacturers of television sets and component parts. In particular the Commission requested that the manufacturers submit all accident reports collected since the National Commission on Product Safety held hearings on the subject in 1969.[3] Although a few manufacturers complied with the Commission's request, the principal response consisted of a six-page summary of accident data supplied by the Electronics Industry Association (EIA).

After reviewing the data voluntarily submitted, the Commission concluded that the "information submitted to the Commission by the EIA on behalf of the [companies did] not satisfy the Commission's request."[4] Accordingly, on May 13, 1974 the Commission, acting pursuant to 15 U. S. C. § 2076(b)(1) (Supp. V 1975), sent special orders to 25 manufacturers seeking specified information.[5] In the cover letter accompanying the special orders the Commission noted the possibility of a request for public access to this information via the FOIA, and the manufacturers were instructed to identify data claimed to be exempt from public disclosure and to substantiate any such claims. Claims of confidentiality accompanied the responses of most manufacturers. Again the Commission reviewed the submitted data and again the Commission found that certain of the manufacturers had not complied with the request. Thus on July 26, 1974 supoenas [sic] *duces tecum* were issued to the appellee manufacturers and three other manufacturers [6] requiring production of specified technical information and all television-related accident data.

Appellants' first request for access, under the FOIA, to data submitted by the manufacturers was in June 1974 and pertained to the documents submitted in response to the Commission's special orders of the previous month.[7] Although appellants were given access to those reports for which confidentiality was not claimed by the manufacturers, they were not allowed access to documents which the manufacturers claimed were exempt from the FOIA.[8] Instead, in August 1974 the Commission informed the manufacturers of appellants' FOIA request and again directed the manufacturers to substantiate their claims of confidentiality. The Commission also extended appellants' FOIA request to the additional data which the Commission later subpoenaed from the manufacturers.[9]

2. 39 Fed. Reg. 10929 (March 22, 1974).

3. *Id.*

4. *E.g.*, Special Order of the Commission to General Electric Company, Docket Item 11A, Ex. A-1, in Civil Action (CA) No. 75-136 (D. Del.).

5. Of the appellee manufacturers here, apparently only RCA did not receive a special order. *GTE Sylvania Inc. v. Consumer Product Safety Com'n*, 404 F. Supp. 352, 358 n. 11 (D. Del. 1975).

6. Sony Corporation, Sanyo Electric, Inc., and Wells-Gardner Electronics Corporation were subpoenaed but did not seek to bar public disclosure of data they forwarded to the Commission. Evidently the Commission did not order all manufacturers of television sets sold in this country to submit accident reports. *GTE Sylvania Inc. v. Consumer Product Safety Com'n, supra* note 5, 404 F. Supp. at 359 n. 18.

7. *Consumers Union of United States v. Consumer Product Safety Com'n*, 400 F. Supp. 848, 850 (D. D. C. 1975).

8. *Id.*

9. *Id.*

Appellants subsequently limited their request to exclude documents protected by the attorney-client privilege or the work product doctrine and those portions of documents that contained names and addresses of accident victims. Even with this limitation, however, appellants' request went unfulfilled.[10] In October 1974, therefore, four months after their initial request, appellants informed the Commission that they would consider any further delay to be a denial. As a result of that communication, representatives of appellants and the Commission met in November 1974 and agreed upon a timetable for completion of the Commission's review of the manufacturers' submissions. It was estimated that the Commission's legal determination as to availability of the requested documents would be completed by mid-March of 1975. Appellants acquiesced in that timetable, but expressly reserved the right to consider additional delay as a denial of their request.[11]

On March 28, 1975—nine months after appellants' initial request—the Commission issued its legal determination that the documents requested by appellants did not fall within the exemptions of the FOIA. It also stated that, even if the data were exempt from mandatory disclosure, disclosure by the Commission was nonetheless within its discretion and, in this case, appropriate in the interest of public health and safety.[12] The Commission subsequently notified the television manufacturers of its decision to release the requested documents on May 1, 1975. After receiving that notice, seven of the manufacturers filed separate actions against the Commission in the United States District Court for the District of Delaware,

10. *Id.*

11. *Id.*

12. *Id.*

each seeking an injunction prohibiting disclosure on the ground that release of the documents is barred by the exemptions to the FOIA and certain portions of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* (Supp. V 1975).[13] Five other television manufacturers filed similar separate actions in the United States District Court for the Southern District of New York,[14] the United States District Court for the Northern District of New York,[15] and the United States District Court for the Western District of Pennsylvania.[16] In all of the actions the manufacturers applied for temporary restraining orders prohibiting release of the documents pending determination of their motions for preliminary injunctions. The Commission consented to the temporary restraining orders in at least some of the cases.[17] Subsequently the individual actions filed by the television manufacturers were consolidated in the District of Delaware.[18] Even though

13. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (CA No. 75-104), RCA (CA No. 75-108), Magnavox (CA No. 75-112), Zenith (CA No. 75-113), Motorola (CA No. 75-114), Warwick (CA No. 75-115), and Aeronutronic Ford (CA No. 75-116).

14. Matushita (CA No. 75-2040), Sharp (CA No. 75-2049), and Toshiba (CA No. 75-2050) filed actions in the Southern District of New York.

15. General Electric (75-CV-189) filed suit in the Northern District of New York.

16. Admiral (CA No. 75-531) filed suit in the Western District of Pennsylvania.

17. Appellants claimed below that the Commission consented to the orders in all of the cases, while the Commission claimed it consented to some but not all of the orders. For purposes of the motion to dismiss, the District Court below accepted appellants' allegations as true. Memorandum Opinion, *supra* note 7, at 5. Because our disposition on appeal does not turn on the number of orders that the Commission consented to, we do not feel it necessary to resolve the issue here or to remand it to the District Court.

18. *GTE Sylvania Inc. v. Consumer Product Safety Com'n*, *supra* note 5.

Rule 65(b) of the Federal Rules of Civil Procedure has been held to limit the duration of temporary restraining orders to a total of 20 days, absent consent by the party against whom the order was directed, *Sims v. Greene*, 160 F. 2d 512, 516 (3d Cir. 1947), the Commission did not object to requests for further extensions of the temporary restraining orders, with the result that oral argument on the manufacturers' preliminary injunction motions was not heard until July 23, and the stays against the Commission's releasing the information continued until those motions were decided. A preliminary injunction, which the Commission did oppose, was entered on October 23, 1975, prohibiting production of the data.[19] For whatever reason, the appellants did not seek to intervene in this action either to contest the manufacturers in Delaware or to have the action transferred to the District of Columbia. And despite full awareness of appellants' requests for access to the documents, neither the manufacturers nor the Commission even attempted to include appellants as parties or to transfer the cases to the District of Columbia where appellants could readily be joined. Furthermore, though the submissions by the Commission in Delaware plainly put that court on notice of the interest of appellants in release of the documents, the court did not on its own motion inquire about the necessity of joining appellants under Rule 19, FED. R. CIV. P.

After the District Court for the District of Delaware entered the preliminary injunction, the Commission filed an interlocutory appeal. The Commission subsequently filed a voluntary motion for dismissal of the appeal, however, and on May 10, 1976 the motion was granted.[20]

19. *Id.*

20. The Commission's motion is on file with the clerk of the Third Circuit, Docket Nos. 76-1095–76-1107.

On August 20, 1976 the District Court "closed out" the case with no further action planned.

III. THE DECISION BELOW

The instant FOIA litigation was filed in the District Court for the District of Columbia on May 5, 1975 and appellants promptly moved for summary judgment. The Commission and the manufacturers, however, moved to dismiss this action on the ground that no case or controversy existed between appellants and the Commission or, in the alternative, to stay the proceedings pending the decision in Delaware.

Four months later and 15 months after appellants initially asked the Commission for access to the documents, the District Court, without oral argument, filed an opinion and entered an order dismissing the action.[21] The District Court concluded that between appellants and the Commission there was no case or controversy since "on the crucial issue in this case"—the claim that the documents are subject to mandatory disclosure under the FOIA—appellants and the Commission "came to the exact same conclusion": that the documents had to be disclosed.[22] The only reason the Commission was not disclosing the documents, according to the court, was that it was prevented from doing so—first by the several temporary restraining orders and then by the preliminary injunction issued by the District Court for the District of Delaware. The court further concluded that, between

21. *Consumers Union of United States v. Consumer Product Safety Com'n*, *supra* note 7.

22. *Id.*, 400 F. Supp. at 851. This most definitely is not, however, "a situation in which [the Government] confesses error and represents that the error will be corrected without need for further court action." *Goosby v. Osser*, 409 U. S. 512, 516 n. 4 (1973), and cases cited therein.

appellants and the manufacturers, there was a failure to state a claim upon which relief could be granted.[23]

IV. The Issues on Appeal

We conclude that the District Court erred, and that there is a case or controversy[24] between appellants and the Commission. At its narrowest compass the case or controversy to be resolved concerns the threshold question of the scope and effect of the proceedings in Delaware. The Commission, echoed by the manufacturers, renews on appeal its argument—accepted by the District Court—that, although it would like to provide appellants with the requested documents, the preliminary injunction entered by the Delaware District Court unequivocally precludes it from doing so. Appellants disagree and deny that the preliminary injunction entered in Delaware absolves the Commission of what they believe is the Commission's statutory duty to furnish the requested documents.

This substantial and extensively argued disagreement among the parties to this action fully satisfies the Article III case or controversy requirement.[25] The scope and

23. *Consumers Union of United States v. Consumer Product Safety Com'n, supra* note 7, 400 F. Supp. at 853.

24. "The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." *In re Pacific Railway Commission,* 32 F. 241, 255 (Circuit Court, N. D. Cal. 1887) (Field, Cir. J.), *quoted in Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 239 (1937).

25. In his opinion in *Aetna Life Ins. Co. v. Haworth, supra* note 24, Chief Justice Hughes provided a now classic explanation of the requirement:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot.

effect of a prior judgment are always legitimate subjects of argument and resolution in a subsequent action,[26] and the judgment entered by the Delaware District Court suggests no reason why it should be considered an exception.

Moreover, the Commission's conduct of the Delaware litigation provides a second, independent reason for rejecting appellees' contention that a case or controversy is lacking. In fact, reviewing both the administrative and litigational prelude to the instant appeal, the Commission's conduct, in several instances, is not easily reconcilable with its ostensible acceptance of appellants' argument that the requested documents should be disclosed.[27] On

25. (Cont'd.)

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * *

300 U. S. at 240-241 (citations omitted).

26. *See* Restatement (Second) of Judgments § 68 (Tent. Draft No. 1, 1973); Advisory Committee Note, 39 F. R. D. 69, 106 (1966), *citing* Restatement of Judgments § 68, comment (h), § 116 (1942); F. James, Civil Procedure § 11.5, at 534-535 (1965); 1B J. Moore, Federal Practice ¶ 0.441[1] at 3772-3773 (Moore & Currier ed. 1974), *quoting Cromwell v. County of Sac,* 94 U. S. (4 Otto) 351, 352-353 (1877). *See also, e.g., Hansberry v. Lee,* 311 U. S. 32, 40-41 (1940); *Gonzales v. Cassidy,* 474 F. 2d 67, 72 (5th Cir. 1973); *Research Corp. v. Edward J. Funk & Sons, Co.,* 15 F. R. Serv. 2d 580 (N. D. Ind. 1971).

We take it to be established beyond cavil that, "[i]nsofar as the * * * judge may have rested his finding of the absence of a case or controversy on the alleged difficulty of formulating a remedy, he also erred." *Goosby v. Osser, supra* note 22, 409 U. S. at 517 n. 5, *citing Louisiana v. United States,* 380 U. S. 145, 154 (1965); *Brown v. Board of Education,* 349 U. S. 294, 300 (1955).

27. For example, despite the time limits imposed on agencies which receive FOIA requests, 5 U. S. C. § 552(6) (1970), the Commission took nine months from the date of appellants' initial request

the basis of this record, we cannot believe that the Commission and the appellants lack the degree of adverseness necessary under the Constitution.

The existence of a case or controversy having been established, we must next consider its merits. That is, we

27. (Cont'd.)
for the documents to issue its determination that the documents could legally be released. *See* p. 7 *supra*. Even more "curious" (to borrow the description of the District Court below) is the fact that the Commission, "having just completed a nine-month legal investigation which led to the conclusion that the documents were available under the FOIA, failed to make even a *pro forma* opposition to the motions for restraining order." *Consumers Union of United States v. Consumer Product Safety Com'n*, *supra* note 7, 400 F. Supp. at 852. Also, as noted above, the Commission did not object to requests for further extensions. *See* p. 8 *supra*.

It is true that the temporary restraining orders were eventually replaced by a preliminary injunction, issuance of which was contested by the Commission. But it is the aftermath of the issuance of this preliminary injunction that constitutes perhaps the most disturbing aspect of the procedural history of this dispute. The Commission initially adopted the quite logical tack of filing an interlocutory appeal from the preliminary injunction. As recounted above, however, soon after filing the appeal *the Commission itself* filed a motion to have the appeal dismissed, and this motion was granted. *See* p. 9 *supra*. Since that time the Commission has evidently made not a single effort to have the District Court take any further action on the case or to have the Third Circuit consider on appeal the District Court's grant of the preliminary injunction. (We particularly stress the Commission's failure to pursue an appeal and its general inaction since the preliminary injunction was granted because these are uncontested facts that, obviously, were not before the District Court when it entered the order from which this appeal is taken.)

In large part, therefore, the prolonged delay and current legal stalemate in this dispute can be attributed to the Commission's inaction. Of course, absent lack of candor or other trifling with the court by the parties, questionable and even clearly incorrect civil litigation strategy is ordinarily beyond the concern of an appellate court. *See, eg., Link v. Wabash R. Co.*, 370 U. S. 626, 633-634 (1962). However, the special nature of the manufacturers' suit in Delaware and its possible effect on Consumers Union and other potential FOIA plaintiffs require this court to pay closer than usual heed to the general background of this dispute and to the overall conduct of the parties.

must consider whether the Commission and the manufacturers or, alternatively, the appellants are correct in their assessment of the legal effect on this action of the Delaware judgment. At first glance appellees' position seems strong. The Delaware District Court preliminarily enjoined the Commission from releasing the contested documents, and that injunction has not been modified in any manner. It would thus appear that appellants' request may indeed be foreclosed.

Yet the correctness of this conclusion, toward which the Commission and the manufacturers urge us so enthusiastically, is not nearly as obvious as they would have us believe. The procedural history of the Delaware proceeding—as adduced by the District Court, as well as in the appellate briefs and at oral argument—is troubling and belies the apparent soundness of appellees' position. There is, first, the obvious and important fact that the Delaware District Court never did resolve the merits of the manufacturers' claim that the contested documents should not be released. Rather, the court limited itself to preliminary enjoining the Commsision from releasing the documents in dispute.[28] The opinion accompanying the injunctive order unmistakably confined itself to the propriety of relief *pendente lite*.[29] An order of that type is only "a conservative measure intended • • • to save all rights until the merits of the controversy can be definitely ascertained • • • . It is not an adjudication of rights in any proper sense of the term • • • [and] it does not follow that the

28. *GTE Sylvania, Inc. v. Consumer Product Safety Com'n*, *supra* note 5, 404 F. Supp. at 375.

29. The Delaware court found that irreparable harm would attend disclosure of the documents, 404 F. Supp. at 375, and that the manufacturers had presented a "*prima facie* case showing a reasonable probability" that divulgence would be unlawful. *Id.* at 389, *quoting Oburn v. Shapp*, 521 F. 2d 142, 148 (3d Cir. 1975).

final adjudication will be in accordance with the interlocutory order." [30]

Standing alone the preliminary injunction, despite its impact on the agency, could not bar the FOIA action instituted by appellants in the District of Columbia. It would, of course, weigh heavily in any decision as to which of the two suits ought, "giving regard to conservation of judicial resources and comprehensive disposition of litigation," [31] to be stayed or enjoined pending the outcome of the other.[32] Here, however, there is no occasion to engage in the balancing that would ordinarily attend such a situation, for nearly a year after entry of the preliminary injunction the Delaware court entered an order "closing out" the case with no further action planned.

While the "close-out" language employed by the Delaware court finds no parallel in either that court's rules or the Federal Rules of Civil Procedures [sic], it does evince an understanding—apparently shared by the parties before it—that the suit had run its course. No one implies that any intervening determination on the merits has converted the interlocutory relief into a permanent injunction; [33] such

30. *United States Electric Lighting Co. v. Metropolitan Club*, 6 App. D. C. 536, 544 (1895). *Accord, Public Service Com'n v. Wisconsin Telephone Co.*, 289 U. S. 67, 70 (1933); *Industrial Bank of Washington v. Tobriner*, 405 F. 2d 1321, 1324 (D. C. Cir. 1968).

31. *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183 (1952). *Cf. Columbia Plaza Corp. v. Security National Bank*, 525 F. 2d 620, 627 (D. C. Cir. 1975). *See also Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817 (1976), and cases cited therein; 2 J. MOORE, FEDERAL PRACTICE ¶ 3.06[2] at 736-739 (Moore & Lucas ed. 1975).

32. *See, e.g., Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., supra* note 31, 342 U. S. at 183-184; *Columbia Plaza Corp. v. Security National Bank, supra* note 31, 525 F. 2d at 627-628.

33. Neither does anyone contend that the hearing on preliminary relief was *sub silentio* consolidated with a hearing on the merits. See Rule 65(a)(2), FED. R. CIV. P. In view of the strictures placed upon such a practice, that is not surprising. *See, e.g.,*

other possible interpretations of the Delaware court's order as suggest themselves tend toward the conclusion that, although the reverse FOIA action was not dismissed in form, it was dismissed in fact, and by acquiescence of the parties the matter was dropped.

With that, the preliminary injunction is dead.[34] When there is no prospect of an adjudication of the merits, relief that purports to be temporary, pending such an adjudication, is obviously superfluous. Whether this "closing out" acknowledges an informal—or even tacit— "settlement" between the Delaware plaintiffs and the Commission we need not inquire, since if it did such a settlement would be void as against public policy.[35] Thus the preliminary injunction need hardly be considered an insuperable barrier to the suit at bar.

Besides the absence of a disposition on the merits, the Commission's conduct of the Delaware litigation is a second factor that makes us reluctant to accept, without more,

33. (Cont'd.)
Brooks v. Nacrelli, 415 F. 2d 272, 275 (3d Cir. 1969), *on remand*, 331 F. Supp. 1350 (E. D. Pa. 1971), *aff'd*, 473 F. 2d 955 (3d Cir. 1973); *Willits v. Richardson*, 497 F. 2d 240, 244 (5th Cir. 1974); *Pughsley v. 3750 Lake Shore Drive Cooperative Building*, 463 F. 2d 1055, 1057 (7th Cir. 1972); *Dry Creek Lodge, Inc. v. United States*, 515 F. 2d 926, 935 (10th Cir. 1975). *But cf. Fenstermacher v. Philadelphia National Bank*, 493 F. 2d 333, 337 (3d Cir. 1974); *Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F. 2d 1096, 1106 (5th Cir. 1972).

34. *See, e.g., Wickes Corp. v. Industrial Financial Corp.*, 493 F. 2d 1173, 1176 (5th Cir. 1974); *Rio Hondo Harvesting Corp. v. Johnson*, 293 F. 2d 426, 427 (5th Cir. 1961); *Heasley v. United States*, 312 F. 2d 641, 648-649 (8th Cir. 1963); *Sweeney v. Hanley*, 126 F. 97, 99 (9th Cir. 1903), *cert. denied*, 193 U. S. 671 (1904). *Cf.* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 at 427 (1973); 7 J. MOORE, FEDERAL PRACTICE ¶ 65.07 at 65-86 (Moore & Lucas ed. 1975). *See also United States v. Professional Air Traffic Controllers Organization*, 449 F. 2d 1299, 1300 (3d Cir. 1971).

35. *Cf. Petkas v. Staats*, 501 F. 2d 887 (D. C. Cir. 1974).

the contention that the Delaware proceedings preclude appellants' suit here. As described above,[36] the Commission was, in several respects, less than vigilant in espousing its putative view that the requested documents should be disclosed.

Yet another, related reason for declining to give the Delaware judgment the preemptive effect that appellees argue it deserves is the absence from the Delaware proceedings of any party requesting disclosure. Not only were the appellants in this case not participants in that suit, neither was any other private party besides the manufacturers. Given the Government's peculiar approach to those proceedings, therefore, the pro-disclosure position was all but unrepresented. This important consideration further attenuates any claim that the preliminary injunction is binding on appellants here.

V. Conclusion

Accordingly, we remand this case to the District Court for the District of Columbia.[37] The issue on remand will be, quite simply, whether or not the documents should in fact be disclosed. In resolving this issue the District Court for the District of Columbia offers a peculiarly appropriate forum. The party that possesses the requested information (*i.e.*, the Commission), the parties that requested the information (Consumers Union and Public

36. *See* pp. 12-13 & note 27 *supra*.

37. Jurisdiction in the District Court is predicated on 5 U. S. C. § 552(a)(4)(B) (Supp. V 1975), which provides that under the FOIA:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records improperly withheld from the complainant. • • •

Citizens), and the parties that supplied the information (the manufacturers) are all joined in the suit and are ready to present their respective views on the merits. We find no constitutional or procedural bar to adjudication.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al., *Plaintiffs-Appellants,*

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al., *Defendants-Appellees.*

PETITION OF APPELLEE RCA CORPORATION FOR LEAVE TO LODGE EXHIBITS ATTACHED TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

To The Honorable Court:

Appellees, RCA moves this Honorable Court of Appeals to allow leave to lodge the attached exhibits (A-F with index) with its petition for rehearing. It is appellees belief that the Court is under a misapprehension concerning the status of the Delaware case and the exhibits attached hereto to RCA's petition will give a true status of the Delaware case and be of significant aid to this Court.

WHEREFORE, RCA's petition should be granted.

Respectfully submitted,

[Signatures of Counsel Deleted]

[Certificate of service and Exhibits B, D, E and F omitted in printing. Exhibits A and C follow.]

Exhibit A—Preliminary Injunction Entered by the Delaware District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 75-104, 75-108, 75-112, 75-113, 75-114, 75-115, 75-116, 75-122, 75-131, 75-136, 75-150, 75-151, 75-152

GTE SYLVANIA, INC., et al., *Plaintiffs,*

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al., *Defendants.*

Preliminary Injunction

On the basis of findings of fact and conclusions of law set forth in the Court's opinion of this date entered in these cases, it is

ORDERED

1. That pending final hearing and determination by the Court or until further order of the Court, the defendant, Consumer Product Safety Commission ("Commission"), its members, agents, officers, employees and all other persons in active concert and participation with them are hereby enjoined from disclosing to the public in any manner:

(a) Any data submitted by plaintiffs to the defendant Commission in response to a special order issued May 13, 1974;

(b) Any data submitted by plaintiffs to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and

(c) Any report, extraction, computer analysis, or other document or documents purporting to be a summary or compilation of the data previously supplied to the Commission described in sub-paragraphs (a) and (b) above.

2. Provided, however, the Commission is not enjoined hereby from making certain limited disclosures to Underwriters Laboratories, Inc. ("UL"), the entity retained by the Commission to develop safety standards for television receivers under 15 U.S.C. § 2056, upon the following terms and conditions:

(a) UL and those assisting in development of safety standards for television receivers shall be permitted access to computerized summaries of "accident reports" submitted to the Commission in response to the Commission's July 26, 1974 subpoena duces tecum (served on 16 television manufacturers) in a form that does not, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis. The computerized summaries shall contain no identifying symbols which will permit identification of "accidents" reported by a single manufacturer.

(b) For the sole purpose of developing safety standards for television receivers and not for public

disclosure, the following employees of UL shall be permitted access to all of the "accident reports" and data submitted to the Commission by the 16 television manufacturers: Mr. S. David Hoffman, Mr. John Stevenson, Mr. Steven Coen and Ms. Frances Newell. These four employees of UL will make use of such "accident reports" and data only in connection with the development of safety standards for television receivers and will not disclose the "accident reports" or data nor make any written or oral reports of the contents thereof to any person other than an employee of the Commission. No other written or oral reports will be prepared by these four employees of UL, which will in any way, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis.

3. Provided further, however, that the Commission is not enjoined hereby from public disclosure of the "Report on Analysis of TV Accident Data to Consumer Product Safety Commission," dated April 25, 1975 by Robert A. Yereance (the "Yereance Report") so long as that Report or any accompanying information does not in any way, directly or indirectly, identify the manufacturers, model or chassis number of any television receivers alleged to have been involved in any "accidents" allegedly associated with any particular manufacturer, model or chassis.

Petition of Appellee RCA for Leave to Lodge Exhibits

Exhibit A—Preliminary Injunction Entered by the Delaware District Court

4. Copies of this preliminary injunction shall be furnished to Messrs. Hoffman, Stevenson and Coen, and Ms. Newell, and all others assisting UL in the development of safety standards for television receivers forthwith.

Dated: October 23, 1975.

/s/ JAMES L. LATCHUM
Chief Judge

Petition of Appellee RCA for Leave to Lodge Exhibits

Exhibit C—Minute Order Entered by the Delaware District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Minute Order Termination.

A preliminary injunction was issued in the above case on October 23, 1975 and since the parties do not now know whether further action is contemplated in this litigation, there is no need to maintain these cases as open litigation for statistical purposes, therefore it is

ORDERED

1. The Clerk is hereby instructed to submit a JS-6 form to the Administrative Office and close these cases for statistical purposes.

2. Nothing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered.

Dated: August 20, 1976.

/s/ JAMES L. LATCHUM
Chief Judge

Order of the Court of Appeals Granting Motions to Lodge Exhibits

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC. AND PUBLIC CITIZENS HEALTH RESEARCH GROUP, *Appellants,*

v.

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*

Before: BAZELON, *Chief Judge*, and WRIGHT AND ROBINSON, *Circuit Judges.*

Filed August 25, 1977

Order

Appellees, The Admiral Corporation et al, filed a motion to lodge exhibits on July 19, 1977. On July 18, 1977, appellees Aeronutronic Ford Corporation, et al, filed a motion to file an appendix to the petition for rehearing and suggestion for rehearing *en banc.* On July 19, 1977, appellees RCA Corporation filed a motion for leave to lodge exhibits attached to petition for rehearing *en banc.* On August 24, 1977, the Consumer Product Safety Commission moved to lodge certain documents in a related case. On consideration of the foregoing, it is

Order of the Court of Appeals Granting Motions to Lodge Exhibits

ORDERED by the Court that the aforesaid motions are granted.

Per Curiam

For the Court:

George A. Fisher, Clerk

By: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Order of the Court of Appeals Denying Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Before: BAZELON, *Chief Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

Order.

After considering the applications for rehearing filed by federal appellees, appellees Aeronutronic Ford Corporation, et al., appellees Admiral Corporation, et al., and appellee RCA Corporation, together with supporting memoranda, and appellants' response, it is

ORDERED by the Court that the applications for rehearing are denied for the reasons stated in the attached *per curiam*.

Per Curiam
For the Court
George A. Fisher, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

Order of the Court of Appeals Denying Rehearing

PER CURIAM: On June 14, 1974 appellants sought production of the documents in suit here under the Freedom of Information Act. Instead of producing the documents after determining that the Act required production, appellee Consumer Product Safety Commission (CPSC) notified intervenors of their intention to do so. Whereupon intervenors filed injunction proceedings against the CPSC in various district courts, including the District of Delaware, seeking to prevent production. Subsequently, the District Court in Delaware issued a preliminary injunction precluding production. Later that court ordered the case closed with the preliminary injunction still pending.

This appeal is from the dismissal of appellants' FOIA case by the District Court here on the ground that no case or controversy existed since the CPSC agrees with appellants that the documents should be produced but is prevented from doing so by the preliminary injunction in the "closed" Delaware case. We reversed, holding that a case or controversy did indeed exist because CPSC continues to refuse to produce the documents.

Since our ruling we are advised that the Delaware case was marked "closed" for statistical reasons in that the case had been inactive for some time. Also, within a few days after our ruling, the Delaware case suddenly became active with a hearing in court, at which a date for trial on the merits was set. Appellants here, however, who have been attempting since 1974 to obtain production of the documents under FOIA, and against whom the Delaware litigation is directed, are not parties to the Delaware litigation. *See* Rule 19, Fed. R. Civ. P. Since all necessary parties are before the District Court here, there appears no reason why the litigation should not proceed here, particularly since this is the venue authorized by the FOIA.

5 U. S. C. § 552(a)(4)(B) (Supp. IV, 1974).* Since the Act also provides that actions under it should be expedited, 5 U. S. C. § 552(a)(4)(D) (Supp. IV, 1974), at long last so be it.

So ordered.

* It is noteworthy that the Department of Justice has moved to transfer the Delaware case to the District of Columbia.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—

No. 75-2059

—

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

—

Before: BAZELON, *Chief Judge*, WRIGHT, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*.

Order.

On consideration of the suggestions for rehearing *en banc*, and no judge in regular active service having requested a vote thereon, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestions are denied.

Per Curiam
For the Court:
George A. Fisher, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 16, 1978

Re: GTE Sylvania, Incorporated, et al. v. Consumers Union of the United States, et al., No. 77-508

The Court today entered the following order in the above-entitled case:

> The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware on December 8, 1977 in Civil Action No. 75-104.

MICHAEL RODAK, JR., Clerk

SECOND OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF THE UNITED STATES, INC. et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Filed December 22, 1978

Before WRIGHT, *Chief Judge*, and BAZELON, and ROBINSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: At the core of this litigation [1] is appellants' challenge [2] under the Freedom of Information Act (FOIA)[3] to the Consumer Product

1. Our earlier decisions are cited *infra* notes 4 and 9.

2. Because of the grounds on which our previous decisions rested, it was unnecessary to deal with the problems that are squarely presented now.

3. Pub. L. No. 89-554, 80 Stat. 383 (1966), *as amended*, 5 U. S. C. § 552(a)(3)-(e) (1976).

Safety Commission's failure to disclose data concerning accidents attributable to the operation of television sets. When their cause was first before us, we reversed the District Court's ruling that no case or controversy was presented.[4] That determination had been premised on the Commission's acknowledged willingness to release the data save for a ban imposed thereon by a preliminary injunction awarded television manufacturers by the District Court for the District of Delaware in a reverse-FOIA suit involving the same information.[5] We held that the Delaware action, to which appellants were not parties, was no obstacle to their effort in the District Court here.[6] We reasoned that a preliminary injunction is designed merely to preserve the status quo ante pending final decision, and " 'is not an adjudication of rights in any proper sense of the term. . . .' "[7] Because the Delaware court had entered an order "closing out" the case before any final stage had been reached, we concluded that the Delaware proceeding was not "an insuperable barrier to the suit at bar."[8]

We later were informed that the Delaware action had not really been terminated, but that the "closing out" order was apparently a means merely of placating the periodic call for statistics reflecting judicial efficiency in processing caseloads.[9] In denying rehearing, we noted that appellants had still not been added as parties to the Delaware proceedings, and explained that "[s]ince all

4. *Consumers Union v. Consumer Prod. Safety Comm'n*, 182 U. S. App. D. C. 351, 561 F. 2d 349 (1977).

5. See *id.* at 356, 561 F. 2d 354.

6. *Id.* at 359, 561 F. 2d at 357.

7. *Id.* at 358, 561 F. 2d at 356, quoting *United States Elec. Lighting Co. v. Metropolitan Club*, 6 App. D. C. 536, 544 (1895).

8. 182 U. S. App. D. C. at 358, 561 F. 2d at 356.

9. *Consumers Union v. Consumer Prod. Safety Comm'n*, 184 U. S. App. D. C. 146, 147, 565 F. 2d 721, 722 (1977).

necessary parties are before the District Court here, there appears no reason why the litigation should not proceed here, particularly since this is the venue authorized by the FOIA."[10]

Our prior opinions spurred the manufacturers to renew vigorously their pursuit of a judgment on the merits in Delaware, and appellants made no effort to have the District Court here enjoin them from that course. And the Commission, at long last, moved in the Delaware court for a change of venue to the District of Columbia, but added no alternative motion to join the FOIA requesters in the Delaware case—in which, we are now told, their rights have been fully and finally adjudicated. The Delaware court denied transfer primarily on the ground that, though the Commission faced the possibility of inconsistent outcomes on the merits, "[t]he time for the Commission to have moved for a transfer of these cases was in the early stages of this litigation in 1975 before all the effort and work had been expended here."[11]

While a petition to the Supreme Court for a writ of certiorari in this case was pending, the Delaware court issued a permanent injunction.[12] The Supreme Court subsequently granted certiorari and remanded the case to us "for further consideration in light of the permanent injunction."[13] Thus we are now brought face-to-face with the issue we had earlier reserved: Does a judgment in

10. *Id.*

11. *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n*, 438 F. Supp. 208, 212 (D. Del. 1977). The court noted that "the Commission does not contend that the convenience of the parties and witnesses requires a transfer of these actions to the District of Columbia." *Id.* at 211.

12. *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n*, 443 F. Supp. 1152 (D. Del. 1977), *appeal pending*, No. 78-1328 (3d Cir.).

13. *GTE Sylvania, Inc. v. Consumers Union*, 434 U. S. 1030, 98 S. Ct. 761, 54 L. Ed. 2d 778 (1978).

favor of information-suppliers in a reverse-FOIA suit bar requesters not parties thereto from litigating their contention that the Freedom of Information Act mandates disclosure? [14] The answer, we think, becomes clear once one investigates the interrelationship of the Act and reverse-FOIA suits in light of traditional principles governing preclusion of subsequent litigation.

I. The Rationales for FOIA and Reverse-FOIA Suits.

Before the Freedom of Information Act was adopted, official dissemination of information was frequently marked by caprice,[15] and suits to obtain information or

14. See *Consumers Union v. Consumer Prod. Safety Comm'n*, *supra* note 4, 182 U. S. App. D. C. at 359, 561 F. 2d at 357. After the remand, we called upon the parties for, and they submitted, supplemental memoranda setting forth their views as to the course the court should take, addressing particularly the question stated in text.

15. Section 3(c) of the original Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 238 (1946), which the Freedom of Information Act replaced, provided that "[s]ave as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." This section was perceived as "not intended to open up Government files for general inspection," Attorney General's Manual on Administrative Procedure Act 25 (1947), and agency responses to requests for information often evidenced an appreciation of secrecy for secrecy's sake. See S. Rep. No. 813, 89th Cong., 2d Sess. 3-5 (1965); H. R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6 (1966); *EPA v. Mink*, 410 U. S. 73, 79, 93 S. Ct. 827, 832, 35 L. Ed. 2d 119, 127-128 (1973); *Getman v. NLRB*, 146 U. S. App. D. C. 209, 217-218, 450 F. 2d 670, 678-679, *stay denied*, 404 U. S. 1204, 92 S. Ct. 7, 30 L. E. 2d 8 (1971); Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 Notre Dame Law. 417, 435-437 (1965). The breadth of agency discretion under § 3(c) was in no way curtailed by the courts, see, *e.g.*, *FCC v. Schreiber*, 381 U. S. 279, 293, 85 S. Ct. 1459, 1469, 14 L. Ed. 2d 383, 393 (1965); *cf. Appeal of SEC*, 226 F. 2d 501, 517-519 (6th Cir. 1955); but *cf. Graber Mfg. Co. v. Dixon*, 223 F. Supp. 1020 (D. D. C. 1963), and that section had little practical effect on prior law. *Cf. United States ex rel. Stowell v. Deming*, 57 App. D. G. 223, 224, 19 F. 2d 697, 698, *cert. denied*, 275 U. S. 531, 48 S. Ct. 28, 72 L. Ed. 419 (1927).

to forestall its release met with "far from uniform" [16] judicial treatment.[17] The Act was intended to rationalize agency disclosure policies [18] by providing a mechanism for balancing the public's "right to know" against the agency's interest in preserving confidentiality.[19] If a court finds that the Act applies to material for which a request has been properly made,[20] that is the end of the matter; the

16. 1 K. Davis, Administrative Law Treatise § 3.13, at 227 (1958).

17. See cases cited *supra* note 15. See also the many cases dealing with the propriety of agency disclosure *sua sponte* or in the course of agency proceedings. *E.g.*, *FCC v. Schreiber*, *supra* note 15; *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U. S. 56, 59 S. Ct. 409, 83 L. Ed. 483 (1939); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U. S. 294, 53 S. Ct. 350, 77 L. Ed. 796 (1933); *FCC v. Menzies*, 145 F. Supp. 164 (D. Md. 1956), *aff'd on other grounds*, 241 F. 2d 81 (4th Cir.), *cert. denied*, 353 U. S. 957, 77 S. Ct. 863, 1 L. Ed. 2d 908 (1957). See generally *Appeal of SEC*, *supra* note 15, 226 F. 2d at 517-519 and cases there cited; J. Chamberlain, N. Dowling & P. Hays, The Judicial Function in Administrative Agencies 112-120 (1942); 1 K. Davis, Administrative Law Treatise § 3.13 (1958 & 1970 Supp.); Rourke, *Law Enforcement Through Publicity*, 24 U. Chi. L. Rev. 225, 242-247 (1957).

18. See, *e.g.*, S. Rep. No. 813 *supra* note 15, at 3:

> It is the purpose of the present bill . . . to establish a general policy of full agency disclosure unless information is exempted. . . . It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting informational policies.

19. *Id.* See also *EPA v. Mink*, *supra* note 15, 410 U. S. at 79-80, 93 S. Ct. at 832, 35 L. Ed. 2d at 127-128.

20. When no "request for identifiable records" has been made, the statute is not activated. 5 U. S. C. § 552(a)(3) (1976); see S. Rep. No. 813, *supra* note 15, at 2; *cf.*, *e.g.*, *Nader v. Volpe*, 151 U. S. App. D. C. 90, 93 n. 26, 466 F. 2d 261, 264 n. 26, 18 A. L. R. Fed. 595 (1972); *FTC v. Cinderella Career & Finishing Schools, Inc.*, 131 U. S. App. D. C. 331, 341 n. 15 (1968) (concurring opinion). See also *Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm'n*, 555 F. 2d 82, 93-94 (3d Cir. 1977). But see *Pennzoil Co. v. FPC*, 534 F. 2d 627, 630 (5th Cir. 1976); *Continental Oil Co. v. FPC*, 519 F. 2d 31, 36 (5th Cir. 1975), *cert. denied*, 425 U. S. 971, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976); *Union Oil Co. v. FPC*, 542 F. 2d 1036, 1045 (9th Cir. 1976).

material *must* be disclosed,[21] for the Act effectuates a congressional judgment that in those circumstances no public or private interest in secrecy outweighs the benefits attending public access.[22] Moreover, in determining whether the Act is operative, the legislative command that disclosure be the rule and exemptions be narrowly construed [23] must be sedulously observed. But Congress in the same breadth specified classes of information to which the Act—and its policy of openness—"do[] not apply." [24] When a court finds that requested material

21. *NLRB v. Sears, Roebuck & Co.*, 421 U. S. 132, 147-148, 95 S. Ct. 1504, 1515, 44 L. Ed. 2d 29, 45-46 (1975).

22. S. Rep. No. 813, *supra* note 15, at 5-6; see, *e.g.*, *Getman v. NLRB*, *supra* note 15, 146 U. S. App. D. C. at 217-219, 450 F. 2d at 678-680; *Soucie v. David*, 145 U. S. App. D. C. 144, 154, 448 F. 2d 1067, 1077 (1971). See also *Department of the Air Force v. Rose*, 425 U. S. 352, 379 n. 17, 96 S. Ct. 1592, 1607 n. 17, 48 L. Ed 2d 11, 31 n. 17 (1976). See generally K. Davis, Administrative Law of the Seventies § 3A.6, at 61 (1976).

23. See *Department of the Air Force v. Rose*, *supra* note 22, 425 U. S. at 361, 96 S. Ct. at 1599-1600, 48 L. Ed. 2d at 21, citing *EPA v. Mink*, *supra* note 15, 410 U. S. at 79, 93 S. Ct. at 832, 35 L. Ed. 2d at 127-128; *Vaughn v. Rosen*, 157 U. S. App. D. C. 340, 343, 484 F. 2d 820, 823 (1973), *cert. denied*, 415 U. S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974), *aff'd after remand*, 173 U. S. App. D. C. 187, 193, 523 F. 2d 1136, 1142, 28 A. L. R. Fed. 623 (1975); *Soucie v. David*, *supra* note 22, 145 U. S. App. D. C. at 157, 448 F. 2d at 1080.

24. 5 U. S. C. § 552(b) (1976); S. Rep. No. 813, *supra* note 15, at 3; see, *e.g.*, *Administrator v. Robertson*, 422 U. S. 255, 261, 95 S. Ct. 2140, 2145, 45 L. Ed. 2d 164, 170 (1975); *NLRB v. Sears, Roebuck & Co.*, *supra* note 21, 421 U. S. at 137, 95 S. Ct. at 1510, 44 L. Ed. 2d at 39; *EPA v. Mink*, *supra* note 15, 410 U. S. at 74, 93 S. Ct. at 830, 35 L. Ed. 2d at 125. Since the Act is "not a withholding statute but a disclosure statute," S. Rep. No. 813, *supra* note 15, at 5; see S. Rep. No. 584, 93d Cong., 2d Sess. 6 (1974); H. R. Rep. No. 1419, 92d Cong., 2d Sess. 7 (1972), the mere fact that information falls within one of its exemptions does not of itself outlaw disclosure. See *Planning Research Corp. v. FPC*, 181 U. S. App. D. C. 33, 36-37 n. 4, 555 F. 2d 970, 973-974 n. 4 (1977), citing S. Rep. No. 584, *supra*, at 6 and *Charles River Park "A", Inc. v. HUD*, 171 U. S. App. D. C. 286, 293, 519 F. 2d 935, 942 (1974) and K. Davis, Administrative Law of the Seventies § 3A.5, at 58-61 (1976) and K. Davis, Administrative Law Treatise

falls into one of these categories, and resultantly that its divulgence is not compelled by the Act, the propriety of voluntary disclosure by the agency must hinge on reconciliation with such other law as is pertinent—whether statute, regulation, the administrative "common law" or general principles of equity.[25]

Some of these residual legal rules may endow private parties with legally cognizable interests in the confidentiality of exempted information; others may bestow on some a greater entitlement to information than the Act itself gives the general public.[26] Since the agency's pur-

24. (Cont'd.)
§ 3A.5, at 122 (1970 Supp.); *Chrysler Corp. v. Schlesinger*, 565 F. 2d 1172, 1185 (3d Cir. 1977), *cert. granted*, 435 U. S. 914, 98 S. Ct. 1466, 55 L. Ed. 2d 504 (1978); *Superior Oil Co. v. FERC*, 563 F. 2d 191, 204 (5th Cir. 1977); Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Lawsuit*, 55 Texas L. Rev. 587, 598-600 (1977); *cf.* Drachsler, *The Freedom of Information Act and the "Right" of Non-Disclosure*, 28 Ad. L. Rev. 1, 5-6 (1976); Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1158-1159 (1975); Comment, *Reverse Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Nw. L. Rev. 995, 1010-1011 (1976). See also *Associated Dry Goods Corp. v. EEOC*, 419 F. Supp. 814, 821 (E. D. Va. 1976). But *cf. Westinghouse Elec. Corp. v. Schlesinger*, 542 F. 2d 1190, 1197 (4th Cir. 1976), *cert. denied*, 431 U. S. 924, 97 S. Ct. 2199, 53 L. Ed. 2d 239 (1977); *McCoy v. Weinberger*, 386 F. Supp. 504, 508 (W. D. Ky. 1974).

25. See, *e.g.*, *Planning Research Corp. v. FPC*, *supra* note 24, 181 U. S. App. D. C. at 36-37 n. 5, 555 F. 2d at 973-974 n. 5, quoting K. Davis, Administrative Law Treatise § 3A.5, at 122 (1970 Supp.); *Charles River Park "A", Inc. v. HUD*, *supra* note 24, 171 U. S. App. D. C. at 140-141, 519 F. 2d at 941-942; *Chrysler Corp. v. Schlesinger*, *supra* note 24, 565 F. 2d at 1192; *Westinghouse Elec. Corp. v. Schlesinger*, *supra* note 24, 542 F. 2d at 1197-1198; *GSA v. Benson*, 415 F. 2d 878, 880 (9th Cir. 1969). But *cf. Babcock & Wilcox Co. v. Rumsfeld*, 70 F. R. D. 595, 601 (N. D. Ohio 1976).

26. Compare, *e.g.*, *United States v. Nixon*, 418 U. S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) with *EPA v. Mink*, *supra* note 15, 410 U. S. at 86-88, 93 S. Ct. at 835-836, 35 L. Ed. 2d at 131-133.

poses will only coincidentally correspond with those of nongovernmental parties, it would be folly to entrust these often-critical private interests[27] to unreviewable bureaucratic discretion. This court has accordingly held that when an agency asserts its intention to comply with a demand for information, parties who would be aggrieved by compliance may sue for a declaration whether that release would be lawful.[28] But such litigants must

27. At least one reverse-FOIA action has been brought by individuals seeking to prevent disclosure to business concerns of confidential information about them. *Sonderegger v. United States Dep't of Interior*, 424 F. Supp. 847 (D. Idaho 1976) (request of claim files on each victim in Teton Dam disaster). Many other FOIA cases, mostly turning on the scope of 5 U. S. C. § 552(b)(6) (1976), indicate that requesters may desire information about "little people." *E.g., Department of the Air Force v. Rose, supra* note 22, 425 U. S. at 373-376, 96 S. Ct. at 1606-1607, 48 L. Ed. 2d at 28-30 (Air Force Academy disciplinary records); *Rural Housing Alliance v. United States Dep't of Agriculture*, 162 U. S. App. D. C. 122, 126, 498 F. 2d 73, 77 (1974) ("information regarding marital status, legitimacy of children, identity of fathers . . . , medical condition, welfare payments, alcoholic consumption, family fights, and so on"). *Ackerly v. Ley*, 137 U. S. App. D. C. 133, 136, 420 F. 2d 1336, 1339 (1967) (medical records); *Wine Hobby U. S. A., Inc. v. Internal Revenue Serv.*, 502 F. 2d 133, 136-137 (3d Cir. 1974) (names, addresses, family status, and personal activities within the home); *Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454 (D. D. C. 1977), *aff'd*, No. 77-1504 (D. C. Cir. Apr. 18, 1977) (names and addresses of former military officers who retired with a disability); *Columbia Packing Co., Inc. v. United States Dep't of Agriculture*, 417 F. Supp. 651, 654 (D. Mass. 1976), *aff'd*, 563 F. 2d 495 (1st Cir. 1977) ("a detailed synopsis of each individual's career within the [government], data about family relationships, financial information and medical records"); *cf. Ditlow v. Schultz*, 170 U. S. App. D. C. 352, 517 F. 2d 166 (1975). Surely these individuals should not be without recourse to judicial review of agency action so deeply affecting their privacy. See generally, Hulett, *Privacy and the Freedom of Information Act*, 27 Ad. L. Rev. 275 (1975); Project, *supra* note 24, 73 Mich. L. Rev. at 1161-1162, 1336-1338.

28. *Charles River Park "A", Inc. v. HUD, supra* note 24, 171 U. S. App. D. C. at 141, 519 F. 2d at 942; see *Planning Research Corp. v. FPC, supra* note 24, 181 U. S. App. D. C. at 40-41, 555 F. 2d at 977-978. See also *Sears, Roebuck & Co. v. GSA*, 180 U. S. App. D. C. 202, 204-205, 553 F. 2d 1378, 1380-1381 (1977).

first pass through the needle's eye of the Freedom of Information Act,[29] for if the Act calls for disclosure they have, of course, no right whatsoever to confidentiality.[30] Only if the Act does not govern need the court examine other sources of law—which may prohibit dissemination, give the agency judicially reviewable or unreviewable discretion to release or retain, or even mandate disclosure, depending on the circumstances.[31]

Reverse-FOIA suits therefore are no blight upon the landscape of the law, but the propriety of their role in any scenario must be carefully considered. Enforcement of such rights of confidentiality as federal law might otherwise recognize must not be allowed to choke the free flow of data contemplated by Congress in the Freedom of Information Act. Surely such an obstruction would be interposed if a judgment adverse to the agency in a reverse-FOIA action were permitted to bar later FOIA suits for the documents in question when no one interested in obtaining the material was a party to the earlier litigation. In our view, no such preemption is warranted, as this case tellingly exemplifies.

II. Theories for Preclusion of Subsequent FOIA Suits

Federal courts in different jurisdictions may sometimes reach conflicting conclusions on the duties of an ad-

29. *Sears, Roebuck & Co. v. GSA, supra* note 28, 180 U. S. App. D. C. at 205, 553 F. 2d at 1381, citing *Charles River Park "A", Inc. v. HUD, supra* note 24, 171 U. S. App. D. C. at 291-292 n. 4, 294 n. 10, 519 F. 2d at 940 n. 4, 941 n. 10 and *Westinghouse Elec. Corp. v. Schlesinger, supra* note 24, 542 F. 2d at 1208 n. 57.

30. See note 22 *supra*.

31. See cases cited *supra* note 23; *GSA v. Benson, supra* note 25, 415 F. 2d at 880, (alternative holding that agency is bound by regulation specifying that even if requested material is exempt, it should be released absent a compelling reason for nondisclosure); *cf.* S. Rep. No. 584, *supra* note 24, at 6; H. R. Rep. No. 1419, *supra* note 24, at 7 (approving regulations similar to those invoked in *Benson*); Drachsler, *supra* note 24, 28 Ad. L. Rev. at 2, 9-11.

ministrative agency, but normally without placing it in an impossible dilemma or bringing on a direct clash of judicial power. A serious conundrum, however, arises when, as here, the subject matter is information and the dispute is over whether it should be disclosed to the public. Once released pursuant to judicial decree, the data cannot be bottled up within the court's geographical area; with modern communications, information made public at any one point may soon be available throughout the country, often within moments. By the same token, when a court orders an agency to retain information, its edict is absolutely useless unless it stops agency action everywhere. Consequently, the first court to decide—in either a FOIA or a reverse-FOIA suit—will have pronounced a judgment that might reach across the Nation, or, on the other hand, might not have any practical effect even in its own jurisdictional domain.

That is exactly the situation here. The Delaware proceeding began, and the Commission was temporarily enjoined, before the appellant-requesters filed their own action in the District of Columbia seeking disclosure. By the time appellants sued, the District Court here knew that should the litigation before it continue, a decision contrary to that of the Delaware court might be reached, and that the Commission could not possibly comply with each of the conflicting orders.

Thus focused, the issue is the proper response of the court chronologically second. We earlier rejected one solution—dismissal for absence of a case or controversy—and we adhere to that position [32] for the reasons then stated.[33] That still leaves other alternatives—dismissal

32. See *Consumers Union of the United States, Inc. v. Consumer Prod. Safety Comm'n, supra* note 4, 182 U. S. App. D. C. at 356-357, 561 F. 2d at 354-355.

33. In the Supreme Court, the Commission stated, contrary to its argument here, that it had become "persuaded . . . that a case

on a theory of *stare decisis*, collateral estoppel or comity, or continuation of the suit in some manner. For more than ample reason, we have chosen the latter course.

A. *Stare Decisis.*

We surely do not gainsay that "the doctrine of stare decisis is still a powerful force in our jurisprudence." [34] So, a court resolving a FOIA claim may choose to defer to a previous judicial decision that the Act does or does not apply to particular documents,[35] whether the prior action sought disclosure or restraint. It has not, however, been our experience that federal judges are either careless or timorous. The notion that any would defer on *stare decisis* grounds to a decision by a co-ordinate court with which he disagreed is unworthy of comment.[36]

33. (Cont'd.)
or controversy, within the meaning of Article III, exists between the requesters and the Commission." Brief for Federal Respondents in Opposition to Petition for a Writ of Certiorari, at 5, *GTE Sylvania, Inc. v. Consumers Union, supra* note 13.

34. *United States v. Maine*, 420 U. S. 515, 527, 95 S. Ct. 1155, 1161, 43 L. Ed. 2d 363, 371 (1975).

35. See generally, Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N. C. L. Rev. 123 (1977). But *cf. Robertson v. Department of Defense*, 402 F. Supp. 1342, 1346-1347 (D. D. C. 1975).

36. See *City Stores Co. v. Lerner Shops of District of Columbia, Inc.*, 133 U. S. App. D. C. 311, 315, 410 F. 2d 1010, 1014 (1969) ("[d]ecisions of district courts and other courts of appeal are, of course, not binding on us and are looked to only for their persuasive effect"; "[i]f they fail to persuade by the use of sound and logical reasoning, they will not be followed, no matter how great their number"); *Watson v. Allen*, 103 U. S. App. D. C. 5, 10, 254 F. 2d 342, 347 (1958), *later appeal*, 107 U. S. App. D. C. 25, 274 F. 2d 87 (1959), (decisions of other courts of appeals "are persuasive and entitled to deference but are not authoritatively binding"). See generally, Vestal, *supra* note 35, 55 N. C. L. Rev. at 130-136. But see Comment, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals*, 85 Yale L. J. 1219 (1978).

B. *Collateral Estoppel.*

Furthermore, the doctrine of collateral estoppel, which does bind parties to a previous suit to such determinations of material issues as are encompassed in the judgment,[37] only rarely precludes nonparties from litigating the same issues afresh.[38] If the FOIA applicant has neither been a party nor otherwise represented in a prior successful reverse-FOIA suit, he will not be blocked from taking his controversy to the courts.[39]

The only parties here who were litigants in Delaware are the Consumer Product Safety Commission and the manufacturers who sought to prevent disclosure of materials that the Commission was prepared to turn over to appellants. An agency's interests in FOIA suits of either

37. See, *e.g.*, *Nixon v. Richey*, 168 U. S. App. D. C. 172, 180 n. 75, 513 F. 2d 430, 438 n. 75 (1975), and cases cited therein; *Wolfe v. Froehlke*, 358 F. Supp. 1318, 1319 (D. D. C. 1973), *aff'd*, 166 U. S. App. D. C. 274, 510 F. 2d 654 (1974). See generally, Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964).

38. See, *e.g.*, *Sea-Land Servs., Inc. v. Gaudet*, 414 U. S. 573, 593-595, 94 S. Ct. 806, 819, 39 L. Ed. 2d 9, 25-26 (1974), citing, *inter alia*, *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U. S. 313, 320-327, 91 S. Ct. 1434, 1439-1442, 28 L. Ed. 2d 788, 795-799 (1971); Vestal, *supra* note 37, 50 Iowa L. Rev. at 63-64; *Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818, 855-856 (1952). See also *Hansberry v. Lee*, 311 U. S. 32, 40, 61 S. Ct. 115, 117, 85 L. Ed. 22, 26 (1940). We are cognizant of isolated decisions of lower federal courts advancing bold new rules for preclusion of nonparties, which have been hailed by commentators as a sign of things to come. See generally McCoid, *A Single Package for Multiparty Disputes*, 28 Stan. L. Rev. 707 (1976); Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. Calif. L. Rev. 357 (1974); Vestal, *Claim Preclusion and Parties in Privity:* Sea-Land Services v. Gaudet *in Perspective*, 60 Iowa L. Rev. 973 (1975). We take no view on these developments, for they do not apply to the situation under discussion here, in which by no means did appellants have a "vicarious day in court." Note, *Collateral Estoppel of Non-parties*, 87 Harv. L. Rev. 1485, 1500 (1974).

39. See *Wolfe v. Froehlke*, *supra* note 37, 358 F. Supp. at 1319; *Robertson v. Department of Defense*, *supra* note 35, 402 F. Supp. at 1346-1347.

stripe diverge markedly from private interests,[40] and raise serious doubt whether the agency could ever be deemed to represent members of the public. Indeed, congressional appreciation of that divergence underlies the Act. The institutional predilections that distinguish the agency's position from the citizens argue against permitting the Commission to do via litigation what it may not do by agreement[41]—to bar applicants from information to which the Act mandates access. Far less do they justify departure from the rule, articulated in the milieu of antitrust enforcement, that "just as the Government is not bound by . . . litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation."[42]

40. As an institutional matter, the agency's policy goals will best be served if it is completely free to expend or conserve the power of its knowledge. See, *e.g.*, Rourke, *supra* note 17, 24 U. Chi. L. Rev. 231-233. One commentator has noted that "[i]t may be bad for appearances in a period of 'openness' and 'honesty' for an agency to refuse disclosure. . . ." O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act*, 30 Bus. Law., 1125, 1134 (1975); accord, Note, *Protection from Government Disclosure—The Reverse FOIA Suit*, 1976 Duke L. J. 330, 359 (1976), *cf.* Comment, *supra* note 24, 70 Nw. U. L. Rev. at 998-999. On the other hand, self-interest may often move the agency to keep secret information that, if revealed, would embarrass it or frustrate its regulatory objectives. See S. Rep. No. 813, *supra* note 15, at 3; H. R. Rep. No. 1497, *supra* note 15, at 5-6.

41. *Petkas v. Staats*, 163 U. S. App. D. C. 327, 329, 501 F. 2d 887, 889 (1974).

42. *Sam Fox Publishing Co. v. United States*, 366 U. S. 683, 690, 81 S. Ct. 1309, 1313, 6 L. Ed. 2d 604, 610 (1961); see *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F. 2d 39, 52 (5th Cir. 1974), *cert. denied*, 419 U. S. 110, 95 S. Ct. 784, 42 L. Ed. 2d 807 (1975); *Robertson v. Department of Defense*, *supra* note 35, 402 F. Supp. at 1346-1347; *cf. City of Chicago v. General Motors Corp.*, 332 F. Supp. 285 (W. D. Ill. 1971), *aff'd*, 467 F. 2d 1262 (1972). But *cf. Proctor & Gamble Co. v. Byers Transp. Co., Inc.*, 355 F. Supp. 547, 558 n. 18 (W. D. Mo. 1973).

We have no quarrel with the proposition that in appropriate circumstances the Government may represent private parties in a judicial proceeding and that that suffices to bar those represented

Nor can the agency's role in reverse-FOIA litigation be likened to that of the named representative of a class in a defendant class action, and thus raise the spectre that a judgment against the agency would extend to bind all putative members of the hypothetical class it supposedly represents. At the outset, the clash of purposes would render the bureaucracy suspect as a representative of any class composed of FOIA requesters.[43] Even passing that, when—as in the present circumstances—no class has been convened, no preclusive effect can possibly follow, and the public's right to know remains secure.

C. *Comity.*

That brings us lastly to comity, here reflected in the principle that "[o]rdinarily, the court first acquiring jurisdiction of a controversy should be allowed to proceed

42. (Cont'd.)
from collaterally attacking the resulting judgment. See *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F. 2d 84, 91-101 (5th Cir.), *cert. denied*, 434 U. S. 832, 98 S. Ct. 117, 54 L. Ed. 2d 93 (1977); Restatement (Second), of Judgments, § 85, comment *d* at 61-62 (Tent. Draft No. 2, 1975). But to accept a governmental agency as an adequate representative of requesting parties whenever the agency nominally favors disclosure is to ignore the stark fact that their interests are not congruent: The agency is concerned with conserving the time and energy of its personnel, and with avoiding establishment of a precedent that in the future might support mandatory divulgence of information it would prefer to keep confidential; the requesters simply want the information. See also note 40 *supra*.

43. To view the Commission as litigant of the requesters' rights in their stead "is to attribute to [it] a power that it cannot be said that [it] has assumed to exercise, and a responsibility which, in view of [its] interests[,] it does not appear that [it] could rightly discharge." *Hansberry v. Lee*, *supra* note 38, 311 U. S. at 46, 61 S. Ct. at 120, 85 L. Ed. at 29. "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Id.* at 45, 61 S. Ct. at 119-120, 85 L. Ed. at 29.

with it without interference from other courts under suits subsequently instituted."[44] Though we have not the smallest quarrel with that time-honored dogma, it should not be permitted to hold sway outside situations in which it was designed to apply. Created to assure judicial efficiency and to reflect abiding respect for other courts,[45] the doctrine surely does not contemplate that fundamental rights of citizens will be adjudicated in forums from which they are absent.

In fact, though perhaps subconsciously at times, the courts have not allowed comity to be debased in such a fashion. The decisions invoking the principle involve circumstances in which the plaintiff in the later federal suit was a party to the earlier action involving the same issues and subject matter.[46] When everyone with an interest

44. *Carbide & Carbon Chem. Corp. v. United States Indus. Chem. Co.*, 140 F. 2d 47, 49 (4th Cir. 1944).

45. See *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817, 96 S. Ct. 1236, 1246, 47 L. Ed. 2d 483, 498 (1976); *Columbia Plaza Corp. v. Security Nat'l Bank*, 173 U. S. App. D. C. 403, 409, 525 F. 2d 620, 626 (1975).

46. *E.g.*, *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U. S. 180, 181, 72 S. Ct. 219, 220, 96 L. Ed. 200, 202 (1952) (parties to subsequent suit were both involved in first action); *Columbia Plaza Corp. v. Security Nat'l Bank*, 173 U. S. App. D. C. 403, 411, 525 F. 2d 620, 628 (1975) (all parties to subsequent suit were involved in first action); *Hilton Hotels Corp. v. Weaver*, 117 U. S. App. D. C. 83, 325 F. 2d 1010 (1963), *cert. denied*, 376 U. S. 951, 84 S. Ct. 968, 11 L. Ed 2d 971 (1964) (same plaintiff in both suits; substantially the same parties altogether); *Food Fair Stores, Inc. v. Square Deal Market Co.*, 88 U. S. App. D. C. 176, 177, 187 F. 2d 219, 220 (1951) (same parties and issues); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F. 2d 1197, 1202-1203 (2d Cir. 1970) (same parties and issues); *Cresta Blanca Wine Co. v. Eastern Wine Corp.*, 143 F. 2d 1012, 1014 (2d Cir. 1944) (second suit by defendant in prior proceeding against plaintiffs in that first action must be enjoined, but suit on same issue and subject matter against corporation that was not party to first suit must be allowed to continue); *Carbide & Carbon Chem. Corp. v. United States Indus. Chem. Co.*, *supra* note 44, 140 F. 2d at 49 (same parties in both suits); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F. 2d 403, 405 (5th Cir. 1971) (de-

could have had his claim resolved in one court, it would be senseless to allow some of the parties to initiate concurrent litigation over the same dispute. But that is not this case. Some—at least appellants—with a stake in the controversy were not before the Delaware court, and accordingly the principle of comity is inapplicable.[47] Even if comity might be thought at all relevant, it would not outweigh the non-parties' right, guaranteed by the Act[48] and the Constitution,[49] to have their claims adjudicated.

III. Accommodating FOIA and Reverse-FOIA Suits.

The sum of the foregoing is that none of the familiar anti-relitigation doctrines operates to deprive nonparty requesters of their right to sue for enforcement of the Freedom of Information Act; rather, they remain unaffected by prior litigation solely between the submitters and the involved agency. One obvious consequence is that federal agencies that are prey to reverse-FOIA suits may

46. (Cont'd.)
fendants in first suit brought subsequent action); *Martin v. Graybar Elec. Co.*, 266 F. 2d 202, 204 (7th Cir. 1959) (both suits involved the same parties and issues); *American Chem. Paint Co. v. Thompson Chem. Corp.*, 244 F. 2d 64, 65-66 (9th Cir. 1957) (same plaintiffs in all suits); *O'Hare Internat'l Bank v. Lambert*, 459 F. 2d 328, 330 (10th Cir. 1972) (identical actions brought by same party). See also, *e.g.*, *Will v. Calvert Fire Ins. Co.*, — U. S. —, —, 98 S. Ct. 2552, 2555, 57 L. Ed. 2d 504, 508 (1978) (same parties and issue in state and federal court suits); *Colorado River Water Conservation Dist. v. United States*, *supra* note 45, 424 U. S. at 806, 96 S. Ct. at 1240-1241, 47 L. Ed. 2d at 491 (same); *Brillhart v. Excess Ins. Co.*, 316 U. S. 491, 494-495, 62 S. Ct. 1173, 1175-1176, 86 L. Ed. 1620, 1625 (1942) (same); *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 263, 31 S. Ct. 11, 13-14, 54 L. Ed. 1032, 1038-1039 (1910) (plaintiff in subsequent state suit was a corporation utilized merely as a device by defendant in first federal suit).

47. *Robertson v. Department of Defense*, *supra* note 35, 402 F. Supp. at 1346, citing *Great N. Ry. Co. v. National R. R. Adjustment Bd.*, 422 F. 2d 1187, 1193 (7th Cir. 1970).

48. See 5 U. S. C. § 552(a)(4)(B) (1976).

49. See text *infra* at notes 60-61.

by that token find themselves subject to the possibility of inconsistent judgments. Threats of that nature are not unprecedented, however, and there are procedural devices aplenty designed to avoid the hazard of conflicting obligations.[50] Resort to them in the present context, moreover, would have brought about representation of all interests before the court that first addressed the merits, and thereby would have eliminated the problem completely.

Another consequence is that reverse-FOIA plaintiffs may find that, to prevent judgments in their favor from becoming nugatory, they must join in their lawsuits anyone whose request for information quickened the submitter's controversy with the agency[51]—or perhaps even, by way of a defendant class action, all those who likely may subsequently make such requests. That, too, can only be salutary, for it will assure that the public's interest will be represented by at least one of its own. It will also relieve courts of the temptation—to which we earlier succumbed—to undertake a critique of the agency's litigative strategy.[52]

The manufacturer-plaintiffs could have named appellant-requesters as defendants in the Delaware lawsuit, or they could have maintained it as a defendant class action against the Commission and all possible requesters.[53]

50. See, *e.g.*, *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 155 (D. D. C. 1976) (transfer and consolidation of FOIA and reverse-FOIA suits); *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171 (D. D. C. 1973) (reverse-FOIA advocate permitted to intervene as of right in FOIA suit). See also text *infra* at notes 53-56.

51. Joining the requester may constrain the reverse-FOIA plaintiff's choice of venue. See 28 U. S. C. A. § 1391(e) (1977 Supp.). See also 5 U. S. C. § 552(a)(4)(B) (1976), discussed in notes 66 and 71 *infra*.

52. See *Consumers Union v. Consumer Prod. Safety Comm'n*, *supra* note 4, 182 U. S. App. D. C. at 356-357, 561 F. 2d at 354-355.

53. See *United States v. Trucking Employers, Inc.*, 75 F. R. D. 682, 686-687 (D. D. C. 1977); Fed. R. Civ. P. 23(a) ("[o]ne or more members of a class may sue or be sued as representative

They did not. The Commission, with some creativity, could have filed an interpleader counterclaim and joined the requesters on the theory that otherwise the Commission might be exposed to multiple accountability and that, in a dispute over disclosure, information is an indivisible res over which the parties contest.[54] It did not. At the very least, the Commission could have urged that the requesters were parties whose joinder was required under Civil Rule 19.[55] But no consideration was given to the mandates of that rule,[56] though, as we now elucidate, its applicability could hardly have been questioned.

If, as the manufacturers and the Commission assert, the Delaware reverse-FOIA suit so affected appellants' interest in disclosure of the information sought that they are now barred from litigating it in the District Court here, the Delaware action certainly could have been said, in the words of Rule 19, "as a practical matter [to] impede [their] ability to protect that interest or . . . [to] leave [the agency] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [appellants'] claimed interest." [57]

53. (Cont'd.)
parties on behalf of all" if certain prerequisites are met). See generally Wolfson, *Defendant Class Actions,* 38 Ohio St. L. J. 459 (1977); Note, *Defendant Class Actions,* 91 Harv. L. Rev. 630 (1978).

54. See Fed. R. Civ. P. 22; Advisory Committee's Note to Fed. R. Civ. P. 19, reprinted in 39 F. R. D. 89, 92 (1966); *cf. Gauss v. Kirk,* 91 U. S. App. D. C. 80, 83, 198 F. 2d 83, 86 (1952).

55. Fed. R. Civ. P. 19.

56. Indeed, though any court may—and should, if justified—examine the issue of Rule 19 *sua sponte,* the Commission refused to consent to the filing of the requesters' amicus brief raising the question on the appeal to the Third Circuit of the Delaware court's ruling. See note 12 *supra.* The Third Circuit granted leave to file the brief, however.

57. Fed. R. Civ. P. 19(a). The possible difficulty that reverse-FOIA plaintiffs might not know the identities of all present or future requesters can be ameliorated by joining any known requesters as representatives of a defendant class. See note 53 *supra.*

Indeed, the concept of joinder was created to resolve the problem of conflicting exercise of equity jurisdiction.[58] Rule 19(b) states the considerations that must guide a determination whether one described by Rule 19(a) must be regarded as so indispensable that the litigation must be dismissed. Those factors include

> first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In our view, those factors, had anyone in the Delaware action paused to look at them, surely demanded dismissal of the manufacturers' Delaware suit, or at least an injunction shaped to impact to the smallest possible extent upon the absent requesters' interest.

Joinder of the requesters would have been the better course, for it would have avoided the duplicative litigation in which we now are unfortunately entangled, but it was not the only solution. A well-crafted judgment in Delaware could have steered clear of any embarrassment to appellants' claim. Indeed, the inherent tension between

58. See *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U. S. 102, 120, 88 S. Ct. 733, 743-744, 19 L. Ed. 2d 936, 950-951 (1968). Rule 19 also helps "to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject matter, by a decree which might otherwise be granted upon a partial view only of the real merits." *Minnesota v. Northern Sec. Co.,* 184 U. S. 199, 235, 22 S. Ct. 308, 322, 46 L. Ed. 499, 516 (1902).

reverse-FOIA and FOIA suits could often be mitigated by a rule that, unless the party resisting disclosure joins in his reverse-FOIA suit those seeking release, any injunction therein must be drafted to halt only voluntary disclosure by the agency, and to leave unaffected the requesters' right to seek a subsequent judicial determination that the Act mandates disclosure.[59]

IV. Conclusion.

Appellant requesters were not made parties to the Delaware action, and the effect of that omission on this litigation is, to us, indisputable. A judgment cannot bind those who were not before the court either in person or through some sort of representative.[60] As the Supreme Court has declared, in dealing with situations where "a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties . . . , no Court can adjudicate directly upon a person's right, without the party being

59. See *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 112 n. 10, 88 S. Ct. at 739, n. 10, 19 L. Ed. 2d at 946 n. 10 (the pertinent questions are "[c]an the decree be written so as to protect the legitimate interests of outsiders and, if so, would such a decree be adequate to the plaintiff's needs and an efficient use of judicial machinery"). We need not reach the question whether by similar reasoning requesters must always join submitters as defendants in their FOIA suits, for appellants here have done so in their complaint.

60. *Hansberry v. Lee, supra* note 38, 311 U. S. at 40-41, 45, 61 S. Ct. at 117-118, 119-120, 85 L. Ed. at 26-27, 29; see *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 110, 88 S. Ct. at 738, 19 L. Ed. 2d at 945 ("[o]f course, since the outsider is not before the court, he cannot be bound by the judgment rendered"); *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., supra* note 46, 342 U. S. at 186, 72 S. Ct. at 222, 96 L. Ed. at 204 ("[i]f the patentee's suit against a customer is brought in a district where the manufacturer cannot be joined as a defendant, the manufacturer may be permitted simultaneously to prosecute a declaratory action against the patentee elsewhere").

either actually or constructively before the Court."[61] This basic tenet of due process can hardly be circumvented through the ritualistic invocation of "comity." The manufacturers have no valid objection to relitigation of disclosure of this information, "for clearly the plaintiff [in the earlier suit], who himself chose the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtain[ed] against them."[62] Nor can the Commission legitimately bemoan the threat of inconsistent obligations since it never attempted to foreclose that possibility by seeking the joinder of appellants in Delaware.[63]

61. *Mallow v. Hinde*, 25 U. S. (12 Wheat.) 193, 198, 6 L. Ed. 599, 600 (1827), quoted with approval in *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 122, 88 S. Ct. at 744, 19 L. Ed. 2d at 952. See also *Western Union Tel. Co. v. Pennsylvania*, 368 U. S. 71, 74-75, 82 S. Ct. 199, 201, 7 L. Ed. 2d 139, 142-143 (1961) (forced relinquishment of property interest without assurance that holder will not be held liable again to another in another court violates due process, "and, of course, New York's claims could not be cut off where New York was not heard as a party").

62. *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 111, 88 S. Ct. at 739, 19 L. Ed. 2d at 946; see *Boles v. Greenville Housing Auth.*, 468 F. 2d 476, 479 (6th Cir. 1972) ("[a]ny hardship suffered . . . is attributable to their own failure to bring [an interested person] into the case as a party"). It is no answer to say that a plaintiff normally is allowed to choose how to write his complaint:

> The plaintiff has the right to "control" his own litigation and to choose his own forum. This "right" is, however, like all other rights, "defined" by the rights of others. Thus the defendant has the right to be safe from needless multiple litigation and from incurring avoidable inconsistent obligations. Likewise the interests of the outsider who cannot be joined must be considered. Finally there is the public interest and the interest the court has in seeing that insofar as possible the litigation will be both effective and expeditious.

Schutten v. Shell Oil Co., 421 F. 2d 869, 873 (5th Cir. 1970).

63. See *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 110, 88 S. Ct. at 738, 19 L. Ed. 2d at 945 ("[a]fter trial, however, if the defendant has failed to assert

The only factor even remotely capable of preventing appellants from prosecuting their FOIA suit toward a result contrary to the broad Delaware reverse-FOIA injunction is their failure to intervene in the proceeding there.[64] We believe, however, that appellants, and perhaps information-requesters generally, should not suffer from bypasses of this sort. To decide otherwise would force them to accept the choice of a forum possibly sympathetic to the submitter and surely inconvenient or impossible for the requester.[65] Congress specified the sites

63. (Cont'd.)
this interest [against inconsistent relief], it is quite proper to consider it foreclosed"). Had the Commission raised the issue in a timely fashion, the Delaware court expectably would either have ordered joinder, modified the relief ultimately granted or dismissed the action. The Supreme Court has instructed that if "[a]mong the unpleasant possibilities entailed by proceeding [is] the likelihood that the defendant might find itself subject to directly conflicting injunctive orders . . . 'the court must refuse to exercise jurisdiction . . . or become the instrument of injustice.'" *Id.* at 123, 88 S. Ct. at 745, 19 L. Ed. 2d at 952, quoting *Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co.*, 56 U. S. (15 How.) 233, 246, 14 L. Ed. 674, 681 (1854).

64. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, *supra* note 58, 390 U. S. at 114, 88 S. Ct. at 740, 19 L. Ed. 2d at 947-948 (reversing this question). Compare *Developments in the Law—Multiparty Litigation in Federal Courts*, 71 Harv. L. Rev. 874, 882-883 (1958) with *id.* at 884-885. Preclusion based on the failure to intervene would be proper, if at all, only where the putative intervenor had timely notice of the litigation.

65. For example, in *Westinghouse Elec. Corp. v. Schlesinger*, *supra* note 24, one requesting party was the Legal Aid Society of Alameda County, California, but the reverse-FOIA suit was litigated in Virginia, where the requester felt it necessary to intervene. The inconvenience of cross-country intervention is magnified by the familiar rule that "an intervenor generally is held to have waived his privilege to change the venue of a suit." *Commonwealth Edison Co. v. Train*, 71 F. R. D. 391, 394 (N. D. Ill. 1976), citing *TWA v. CAB*, 339 F. 2d 56, 64 (2d Cir. 1964), *cert. denied*, 382 U. S. 842, 86 S. Ct. 40, 15 L. Ed. 2d 82 (1965) and 3B, Moore's Federal Practice § 24.19 (2d ed. 1975).

proper for judicial consideration of FOIA claims;[66] to allow submitters to force FOIA litigation[67] to occur in other arenas would free the tail to wag the dog.[68]

This, in our opinion, is the type of "undue hardship" expressly discountenanced by the Advisory Committee when it discussed amended Rule 19 in 1966.[69] The rule puts the burden on existing parties and the court to bring in those whose presence is necessary or desirable, and to work out a fair solution when joinder is jurisdictionally impossible.[70] A generally applicable theory of waiver by one who declines to voluntarily step into the proceeding would abrogate the rule and its purpose completely. It is the party's —not the nonparty's—responsibility to make certain that the court has before it all those needed to enable it to serve the ends of justice. And if the essential nonparty cannot, for reasons of personal jurisdiction, be joined in the suit, then the litigation must proceed elsewhere, if at all.[71]

This case, therefore, must finally continue toward a decision on the merits in the District Court for the District

66. The Freedom of Information Act specifies "the district court of the United States in the district in which the complainant [requester] resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia" as the courts in which enforcement of the Act can properly be sought. 5 U. S. C. § 552(a)(4)(B) (1976).

67. As noted earlier, notes 29-30 *supra* and accompanying text, a court analyzing the merits of reverse-FOIA litigation must surely determine the applicability of the disclosure demands of the Act.

68. *Cf. State Farm Fire & Cas. Co. v. Tashire*, 386 U. S. 523, 535, 87 S. Ct. 1199, 1206, 18 L. Ed 2d 270, 278 (1967).

69. Advisory Committee's Note to Fed. R. Civ. P. 19, reprinted in 39 F. R. D. 89, 92 (1966).

70. See *Ricci v. State Bd. of Law Examiners*, 569 F. 2d 782, 784 (3d Cir. 1978); Fed. R. Civ. P. 19(a).

71. Congress specified that the applicability of the Freedom of Information Act be litigated in the requester's district or in other designated areas, but made no provision at all for venue in the submitter's "home court." See note 66 *supra*.

of Columbia. Its first task is to analyze closely the Delaware court's reasoning, for it may turn out that the court here will agree with the Delaware court. Should, however, the court decide that the failure to release the information was indeed improper, it will have to ascertain the relief appropriate in the circumstances. Since the manufacturers are party-defendants, it might consider enjoining them from enforcing their Delaware judgment against the Commission.[72] In short, our decision is a narrow one—that this litigation is not prohibited by the earlier action—and we have not attempted to decide whether or not actual disclosure should be the final result.

Remanded.

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72. Compare *Steelman v. All Continent Corp.*, 301 U. S. 278, 291, 57 S. Ct. 705, 710-711, 81 L. Ed. 1085, 1093 (1937) with *Lapin v. Shulton, Inc.*, 333 F. 2d 169, 172 (9th Cir.), *cert. denied*, 379 U. S. 904, 85 S. Ct. 193, 13 L. Ed. 2d 77 (1964).